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ORIGINAL

PRELIMINARY DRAFT OF PROPOSED AMENDMENTS

TO THE

FEDERAL RULES OF CRIMINAL PROCEDURE,
RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS,
RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS,
AND
FEDERAL RULES OF EVIDENCE

COMMITTEE ON RULES OF PRACTICE
AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE
UNITED STATES

FEBRUARY 1978

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D. C. 20544

To the Bench and Bar:

The Advisory Committee on Criminal Rules appointed by the Chief Justice under the program of the Judicial Conference of the United States for the study of procedural rules, inaugurated pursuant to authority conferred by 28 U.S.C. § 331, has submitted to our Committee a draft of proposed amendments--to Rules 6, 7, 9, 11, 17, 18, 26.1, 32, 35, 40, 41, 43, and 44 of the Federal Rules of Criminal Procedure; Rule 410 of the Federal Rules of Evidence; Rule 10 of the Rules Governing Section 2254 Cases; and Rules 10 and 11 of the Rules Governing Section 2255 Proceedings for the United States District Courts--for our consideration and ultimate report to the Judicial Conference and by it to the Supreme Court. The proposed amendments which the Advisory Committee has thus transmitted are fully explained in the notes which that Committee has appended to each of them.

Our Committee has not yet considered these proposals in detail but submits them herewith to the bench and bar for consideration and suggestions. We request that all comments and suggestions with respect to them be placed in the hands of our Committee as soon as convenient and in any event not later than May 30, 1978 so that we may have the benefit of your views when final consideration is given to the proposals.

All communications with respect to these proposals should be addressed to the Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, Washington, D. C. 20544.

These proposals have not yet been submitted to the Judicial Conference or the Supreme Court and it should be understood that neither the Court nor the Judicial Conference is in any way committed to them and has not given them any consideration.

Roszel C. Thomsen, *Chairman*

Joseph F. Spaniol, Jr., *Secretary*

Washington, D.C.
February 28, 1978

PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS*

Rule 6. The Grand Jury

* * *

(e) ~~SECRECY OF PROCEEDINGS~~ RECORDING AND DISCLOSURE OF PROCEEDINGS.

(1) Recording of Proceedings. All proceedings during which a witness is present shall be recorded stenographically or by an electronic recording device. An inadvertent failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording relating to any indictment returned by the grand jury, or any transcript prepared therefrom, shall be filed under seal with the clerk of the court. The clerk shall not disclose any recording or transcript to anyone other than an attorney for the government except by order of the court after notice to the government.

---

*New matter is underscored; matter to be omitted is lined through.

(~~1~~2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (~~2~~3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of rule 6 may be punished as a contempt of court.

(~~2~~3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to--

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made--

(i) when so directed by a court preliminarily to or in connection with a judicial proceedings; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

(~~3~~4) Sealed Indictments. * * *

ADVISORY COMMITTEE NOTE

Proposed subdivision (e)(1) requires that all proceedings during which a witness is present be recorded. The existing rule does not require that grand jury proceedings be recorded. The provision in rule 6(d) that "a stenographer or operator of a recording device may be present while the grand jury is in session" has been taken to mean that recordation is permissive and not mandatory; see United States v. Aloisio, 440 F.2d 705 (7th Cir. 1971), collecting the cases. However, the cases rather frequently state that recordation of the proceedings is the better practice; see United States v. Aloisio, supra; United States v. Cramer, 447 F.2d 210 (2d Cir. 1971); Schlinsky v. United States, 379 F.2d 735 (1st Cir. 1967); and some cases require the district court, after a demand, to exercise discretion as to whether the proceedings should be recorded. United States v. Price, 474 F.2d 1223 (9th Cir. 1973); United States v. Thoresen, 428 F.2d 654 (9th Cir. 1970). Some district courts have adopted a recording requirement. See, e.g. United States v. Aloisio, supra; United States v. Gramolini, 301 F. Supp. 39 (D.R.I. 1969). Recording of grand jury proceedings is currently a requirement in a number of states. See, e.g., Cal. Pen. Code §§ 938 - 938.3; Iowa Code Ann. § 772.4; Ky. Rev. Stat. Ann. § 28.460; and Ky. R. Crim. P. § 5.16(2).

The assumption underlying the proposal is that the cost of such recording is justified by the contribution made to the improved administration of criminal justice. See United States v. Gramolini, supra, noting: "Nor can it be claimed that the cost of recordation is prohibitive; in an electronic age, the cost of recordation must be categorized as miniscule." For a discussion of the success of electronic recording in Alaska, see Reynolds, Alaska's Ten Years of Electronic Reporting, 56 A.B.A.J. 1080 (1970).

Amond the benefits to be derived from a recordation requirement are the following:

(1) Ensuring that the defendant may impeach a prosecution witness on the basis of his prior inconsistent statements before the grand jury. As noted in the opinion of Oakes, J., in United States v. Cramer: "First, since Dennis v. United States, 384 U.S. 855, 86 S. Ct. 1840, 16 L.Ed. 2d 973 (1966), a defendant has been entitled to examine the grand jury testimony of witnesses against him. On this point, the Court was unanimous, holding that there was 'no justification' for the District of Columbia Court of Appeals' 'replying upon [the] "assumption"' that 'no inconsistencies would have come to light.' The Court's decision was based on the general proposition that '[i]n our adversary system for determining guilt or innocence, it

is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant facts.' In the case at bar the prosecution did have exclusive access to the grand jury testimony of the witness Sager, by virtue of being present, and the defense had none--to determine whether there were any inconsistencies with, say, his subsequent testimony as to damaging admissions by the defendant and his attorney Richard Thaler. The Government claims, and it is supported by the majority here, that there is no problem since defendants were given the benefit of Sager's subsequent statements including these admissions as Jencks Act materials. But assuming this to be true, it does not cure the basic infirmity that the defense could not know whether the witness testified inconsistently before the grand jury."

(2) Ensuring that the testimony received by the grand jury is trustworthy. In United States v. Cramer, Oakes, J., also observed: "The recording of testimony is in a very real sense a circumstantial guaranty of trustworthiness. Without the restraint of being subject to prosecution for perjury, a restraint which is wholly meaningless or nonexistent if the testimony is unrecorded, a witness may make baseless accusations founded on hearsay or false accusations, all resulting in the indictment of a fellow citizen for a crime."

(3) Restraining prosecutorial abuses before the grand jury. As noted in United States v. Gramolini: "In no way does recordation inhibit the grand jury's investigation. True, recordation restrains certain prosecutorial practices which might, in its absence be used, but that is no reason not to record. Indeed, a sophisticated prosecutor must acknowledge that there develops between a grand jury and the prosecutor with whom the jury is closeted a rapport--a dependency relationship--which can easily be turned into an instrument of influence on grand jury deliberations. Recordation is the most effective restraint upon such potential abuses."

(4) Supporting the case made by the prosecution at trial. Oakes, J., observed in United States v. Cramer: "The benefits of having grand jury testimony recorded do not all inure to the defense. See, e.g., United States v. DeSisto, 329 F.2d 929, 934 (2d Cir.), cert. denied, 377 U.S. 979, 84 S.Ct. 1385, 12 L.Ed.2d 747 (1964) (conviction sustained in part on basis of witnesses's prior sworn testimony before grand jury)."

Commentators have also supported a recording requirement. 8 Moore, Federal Practice par. 6.02[2][d] (2d ed. 1972) states: "Fairness to the defendant would seem to compel a change in the practice, particularly in view of the 1970 amendment to 18 USC § 3500 making grand jury testimony of government witnesses available at trial for purposes of impeachment. The requirement of a record may also prove salutary in controlling overreaching or improper examination of witnesses by the prosecutor." Similarly, 1 Wright, Federal Practice and Procedure - Criminal § 103 (1969), states that the present rule "ought to be changed, either by amendment or by judicial construction. The Supreme Court has emphasized the importance to the defense of access to the transcript of the grand jury proceedings [citing Dennis]. A defendant cannot have that advantage if the proceedings go unrecorded." American Bar Association, Report of the Special Committee on Federal Rules of Procedure, 52 F.R.D. 87, 94-95 (1971), renews the committee's 1965 recommendation "that all accusatorial grand jury proceedings either be transcribed by a reporter or recorded by electronic means."

Under proposed subdivision (e)(1), if the failure to record is inadvertent, the failure to record would not invalidate subsequent judicial proceedings. Under present law, the failure to compel production of grand jury testimony where there is no record is not reversible error. See Wyatt v. United States, 388 F.2d 395 (10th Cir. 1968).

The record of grand jury proceedings is to be kept under seal with the clerk of the court. This is the requirement under subdivision (c) for the vote of jurors and under present subdivision (e)(3) for the findings in the indictment. Placing the record under seal serves to keep the proceedings secret until properly disclosed. Subdivision (e)(1) also provides that disclosure of the recording or transcripts is limited.

It must be emphasized that the proposed changes in rule 6(e) deal only with the recording requirement, and in no way expand the circumstances in which disclosure of the grand jury proceedings is permitted or required. "Secrecy of grand jury proceedings is not jeopardized by recordation. The making of a record cannot be equated with disclosure of its contents, and disclosure is controlled by other means." United States v. Price, 474 F.2d 1223 (9th Cir. 1973). Specifically, the proposed changes do not provide for copies of the grand jury minutes to defendants as a matter of right, as is the case in some states. See, e.g., Cal. Pen. Code § 938.1; Iowa Code Ann. § 772.4. The matter of disclosure continues to be governed by other provisions, such as rule 16(a) (recorded statements of the defendant), 18 U.S.C. § 3500 (statements of government witnesses), and the unchanged portions of rule 6(e), and the cases interpreting these provisions. See, e.g., United States v. Howard, 433 F.2d 1 (5th Cir. 1970), and Beatrice Foods Co. v. United States, 312 F.2d 29 (8th Cir. 1963), concerning the showing which must be made of improper matters occurring before the grand jury before disclosure is required.

The sentence added to subdivision (e)(3)(C) gives express recognition to the fact that if the court orders disclosure, it may determine the circumstances of the disclosure. For example, if the proceedings are electronically recorded, the court would have discretion in an appropriate case to deny defendant the right to a transcript at government expense. While it takes special skills to make a stenographic record understandable, an electronic recording can be understood by merely listening to it, thus avoiding the expense of transcription.

Rule 7. The Indictment and the Information

* * *

(c) NATURE AND CONTENTS.

* * *

(2) Criminal Forfeiture. When an offense charged may result in a ~~criminal~~ forfeiture as a part of the sentence in a criminal proceeding, the indictment or the information shall allege the extent of the interest or property subject to forfeiture.

* * *

(g) MOTION TO DISMISS INDICTMENT. An indictment may not be dismissed on the ground that the evidence before the grand jury was not sufficient or competent.

ADVISORY COMMITTEE NOTE

The amendment to rule 7(c)(2) is intended to clarify its meaning. Subdivision (c)(2) was added in 1972, and, as noted in the Advisory Committee Note thereto, was "intended to provide procedural implementation of the recently enacted criminal forfeiture provision of the Organized Crime Control Act of 1970, Title IX, § 1963, and the Comprehensive Drug Abuse Prevention and Control Act of 1970, Title II, § 408(a)(2)." These provisions reestablished a limited common law criminal forfeiture, necessitating the addition of subdivision (c)(2) and corresponding changes in rules 31 and 32, for at common law the defendant in a criminal forfeiture proceeding was entitled to notice, trial, and a special jury finding on the factual issues surrounding the declaration of forfeiture which followed his criminal conviction.

Subdivision (c)(2) has no application to forfeiture proceedings brought under 18 U.S.C. §§ 44, 492, 544, 545, 548, 550, 844, 924, 963, [illegible]4, 965, 966, 967, 969, 1082, 1165, 1465, 1762, 1955, 2274 or 2513, or any other provision whereunder a separate in rem proceeding is necessary before the property in question is forfeited. Some confusion in this regard has resulted from the present wording of subdivision (c)(2). See United States v. Hall, 521 F.2d 406 (9th Cir. 1975), holding noncompliance with rule 7(c)(2) bars subsequent proceedings for forfeiture of smuggled merchandise.

The Supreme Court has declined to hold that defendants may challenge indictments on the ground that they are not supported by sufficient or competent evidence. Costello v. United States, 350 U.S. 359 (1956); Lawn v. United States, 355 U.S. 339 (1958); United States v. Blue, 384 U.S, 251 (1966). Proposed subdivision (g) is in accord with these decisions.

One way in which this issue may arise is when the defendant claims that the indictment is based upon hearsay evidence. Such was the case in Costello v. United States, supra, a tax evasion case, where the government called 144 witnesses at trial, and as a result of their cross-examination it was established that only three government agents, who had no firsthand knowledge of the transactions in question, had appeared before the grand jury. The defendant then renewed his prior motion to dismiss the indictment, but the court declined to do so. The Supreme Court held that "neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act," and emphasized that a contrary rule "would run counter to the whole history of the grand jury institution" and "would result in interminable delay but add nothing to the assurance of a fair trial": "If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury."

It has been aptly noted that the Court in Costello adopted a broad rule which was not limited to the somewhat special circumstances of that case. "The Court might have rested the decision on the peculiar nature of a net-worth prosecution in which witnesses are primarily used to identify documents and their credibility is rarely in question. It also might have emphasized the impracticability of bringing a hundred or more witnesses before the grand jury. The Court obviously, however, intended to formulate a rule of broader application." 8 Moore, Federal Practice par. 6.03[2] (2d ed. 1972).

Costello continues to be followed by the federal courts generally, see, e.g., United States v. Skolek, 474 F.2d 582 (10th Cir. 1973), although some inroads have been made. In United States v. Arcuri, 282 F.Supp. 347 (E.D.N.Y.), aff'd 405 F.2d 691 (2d Cir. 1968), the court announced a prospective rule that "a timely motion to dismiss an indictment ... will be granted without a showing of prejudice to the defendant if it is clear that hearsay alone was deliberately relied upon when better evidence was readily available for presentation to the grand jury." In United States v. Leibowitz, 420 F.2d 39 (2d Cir. 1969), the court, while holding that indictments would not necessarily be dismissed because based principally or wholly upon hearsay, went on to say: "If the grand jury is misled into thinking it is getting eye-witness testimony from the agent whereas it is actually being given an account whose hearsay nature is concealed ... dismissal may be considered. Likewise dismissal may be considered if the defendant could show that there is a high probability that with eyewitness rather than hearsay testimony the grand jury would not have indicted." And more recently, in United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972), the court held that where, except for individuals named in the indictment, the only person who was in a position to inform the grand jury of just what occurred up to the point of arrest and the persons in the best position to inform the grand jury of what occurred thereafter and as to one defendant's postarrest statement were not called, and the sole witness before the grand jury was a city policeman whose observations of defendants were both limited and remote and who, despite his extremely limited personal knowledge, spoke to the grand jury at length and in detail and the grand jurors were not aware of the witness' lack of personal knowledge, dismissal of the indictment was required.

The concerns expressed in Arcuri, Leibowitz and Estepa are not without merit. However, the degree of scrutiny of the grand jury proceedings which would be required to establish the existence of the special circumstances noted in those cases would, as noted in Costello, "result in interminable delay but add nothing to the assurance of a fair trial." A wide ranging inquiry would often be needed to establish whether better evidence was available for presentation to the grand jury or whether the grand jury would have reached a different result if eye-witness testimony had been available. This is particularly apparent when account is taken of the fact that there are often valid reasons for relying upon hearsay testimony before the grand jury. As noted in the commentary to A.B.A. Standards for Criminal Justice, Standards Relating to the Prosecution Function § 3.6(a) (Approved Draft, 1971): "The need to use a summary of available evidence may arise in cases involving voluminous records or where an absent witness has given a written statement but is not available at the time and circumstances justify prompt grand jury action. Similarly, where the victim of a criminal act is seriously injured and therefore is unavailable, someone to whom the relevant facts have been related should be permitted to relate to the grand jury what has been told. A third illustrative situation exists where the safety of an important witness reasonably warrants that his identity remain covert and his statements have been recorded and can be presented to the grand jury in sufficient detail to warrant an indictment."

The issue addressed in the proposed addition to rule 7 may also arise when a defendant claims that the indictment is based upon illegally obtained evidence. For example, in Lawn v. United States, supra, the defendants moved to dismiss a tax evasion indictment and asked for a hearing to determine whether the government had used testimony and records obtained in violation of their constitutional rights. The district court ruled for the government, and on appeal a unanimous Supreme Court affirmed. The Court emphasized "that petitioners had no reason, beyond suspicion, to believe" that the grand jury had used such material and "that petitioners laid no foundation for the holding of a protracted preliminary hearing ... to determine whether there was any substance to their suspicion." However, the Court went on to indicate that even if a foundation had been laid the result would be the same; Costello was cited for the proposition that "an indictment returned by a legally constituted nonbiased grand jury, like an information drawn by a prosecutor, if valid on its face, is enough to call for a trial of the charges on the merits and satisfies the requirements of the Fifth Amendment."

Similarly, in United States v. Blue, supra, the Court reversed the district court's dismissal of an indictment on the ground that the government, in other proceedings, had compelled the defendant to incriminate himself, stating that if the government had acquired evidence in violation of the Fifth Amendment, the defendant would at most be entitled to suppress that evidence and the fruits thereof if they were offered against him at trial. Citing Costello and Lawn, the Court observed: "It does not seem to be contended that tainted evidence was presented to the grand jury; but in any event our precedents indicate this would not be a basis for abating the prosecution pending a new indictment, let alone barring it altogether."

Relying upon Costello, Lawn and Blue, the federal courts have in the main refused to quash indictments where it was claimed that evidence before the grand jury was illegally obtained; see, e.g., West v. United States, 359 F.2d 50 (8th Cir. 1966). On occasion, however, courts and commentators have taken a contrary position. See, e.g., Jones v. United States, 342 F.2d 863 (D.C. Cir. 1964) (four dissenting members of the court argued that an "indictment obtained in violation of constitutional rights must be dismissed, at least where substantial prejudice resulted"); and Note, 43 N.Y.U.L.Rev. 579 (1968) (arguing that "the same policy considerations which dictate the exclusion at trial of unconstitutionally gained evidence militate against the use of such evidence for indictment purposes").

The latter view is rejected here on the ground that permitting challenge of an indictment because of the purported use of illegally obtained evidence before the grand jury would result in substantial delays without any appreciable benefits in terms of deterrence of illegal practices. As noted in West v. United States, supra, "the judicial policy which brought about the exclusionary rule would not be advanced in any significant degree by extending its application to grand jury proceedings," the reason being that whatever deterrence is gained by the knowledge that illegally obtained evidence is not admissible at trial is unlikely to be enhanced by exclusion in pretrial proceedings.

Cf. United States v. Schipani, 315 F.Supp. 253 (E.D.N.Y.), aff'd 435 F.2d 26 (2d Cir. 1970), noting that "no appreciable increment in deterrence would result from applying a second exclusion at sentencing."

Applying the exclusionary rule to grand jury proceedings would be detrimental to the efficient administration of criminal justice. One way to apply the rule to such proceedings would be by making them adversary in nature, so that the exclusionary rule could be enforced by a case-by-case judicial determination at the time the evidence is offered, but this kind of change in the grand jury system "would add an additional burden to judicial time, completely alter our judicial system, and seriously cripple the supposedly investigative purpose of the grand jury." West v. United States, supra. In the absence of an adversary setting, application of the exclusionary rule to grand jury proceedings would be harsh medicine, as "the government would then be forced to make an ex parte determination of the legality of the offered evidence without guidance of opposition or ruling from judicial authority," and "the penalty for a mistake in judgment would be the striking down of the entire grand jury proceeding." West v. United States, supra. Even if the penalty were tempered by the harmless error rule, or by a more generous rule to the effect that the indictment would still stand if the balance of the evidence before the grand jury was sufficient to support a finding of probable cause, see A.L.I. Model Code of Pre-Arraignment Procedure § 340.5 (Proposed Official Draft, 1975), an extended review of all of the evidence placed before the grand jury would be necessary.

The position taken in proposed rule 7(g) is consistent with the view taken by many commentators, e.g., 1 Wright, Federal Practice and Procedure - Criminal § 111 (1969); with the prevailing rule in the state courts, see, e.g., 1963 Wash.U.L.Q. 102, 111-15, noting that where statutes provide that only "competent and legal" evidence may be presented to the grand jury, this language has generally been held to be directory rather than mandatory; and with the procedures applicable in a federal preliminary hearing pursuant to rule 5.1(a).

Rule 9. Warrant or Summons Upon Indictment or Information

(a) ISSUANCE. Upon the request of the attorney for the government the court shall issue a warrant for each defendant named in the information, if it is supported by ~~oath~~ a showing of probable cause as is required by rule 4(a), or in the indictment. The clerk shall issue a summons instead of a warrant upon the request of the attorney for the government or by direction of the court. Upon like request or direction he shall issue more than one warrant or summons for the same defendant. He shall deliver the warrant or summons to the marshal or other person authorized by law to execute or serve it. If a defendant fails to appear in response to the summons, a warrant shall issue.

* * * * * *

ADVISORY COMMITTEE NOTE

Subdivision (a) is amended to make explicit the fact that a warrant may issue upon the basis of an information only if the information or an affidavit filed with the information shows probable cause for the arrest. This has generally been assumed to be the state of the law even though not specifically set out in rule 9; see C. Wright, Federal Practice and Procedure: Criminal § 151 (1969); 8 J. Moore, Federal Practice par. 9.02[2] (2d ed. 1976).

In Gerstein v. Pugh, 420 U.S. 103 (1975), the Supreme Court rejected the contention "that the prosecutor's decision to file an information is itself a determination of probable cause that furnishes sufficient reason to detain a defendant pending trial," commenting:

> Although a conscientious decision that the evidence warrants prosecution affords a measure of protection against unfounded detention, we do not think prosecutorial judgment standing alone meets the requirements of the Fourth Amendment. Indeed, we think the Court's previous decisions compel disapproval of [such] procedure. In Albrecht v. United States, 273 U.S. 1, 5, 47 S.Ct. 250, 251, 71 L.Ed. 505 (1927), the Court held that an arrest warrant issued solely upon a United States Attorney's information was invalid because the accompanying affidavits were defective. Although the Court's opinion did not explicitly state that the prosecutor's official oath could not furnish probable cause, that conclusion was implicit in the judgment that the arrest was illegal under the Fourth Amendment.

No change is made in the rule with respect to warrants issuing upon indictments. In Gerstein, the Court indicated it was not disturbing the prior rule that "an indictment, 'fair upon its face,' and returned by a 'properly constituted grand jury' conclusively determines the existence of probable cause and requires issuance of an arrest warrant without further inquiry." See *Ex parte United States*, 287 U.S. 241, 250 (1932).

Rule 11. Pleas

* * *

(e) PLEA AGREEMENT PROCEDURE.

* * *

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. ~~Thereupon~~ If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified

in subdivision (e)(1)(B), the court shall advise the defendant that such recommendation or request is not binding upon the court and that disapproval will not require the court to allow withdrawal of the plea.

* * *

(6) Inadmissibility of Pleas, ~~Offers of Pleas~~ Plea Discussions, and Related Statements. Except as otherwise provided in this paragraph, evidence of the following ~~a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers,~~ is not admissible ~~in any civil or criminal proceeding~~ against the person who made the plea or ~~offer,~~ was a party to the plea discussions, in any civil or criminal proceeding:

(A) a plea of guilty which was later withdrawn;

(B) a plea of nolo contendere;

(C) plea discussions with the attorney for the government, concerning the crime charged or any other crime, which do not result in a plea of guilty or which result in a plea of guilty later withdrawn; or

(D) statements made in the course of or as a consequence of such pleas or plea discussions.

However, ~~evidence of~~ such a statement ~~made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime,~~ is admissible in any proceeding wherein statements made in the course of or as a consequence of the same plea or plea discussions have been introduced, or in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

ADVISORY COMMITTEE NOTE

The amendment to rule 11(e)(2) is intended to clarify the circumstances in which the court may accept or reject a plea agreement, with the consequences specified in subdivision (e)(3) and (4). The present language has been the cause of some confusion and has led to results which are not entirely consistent. Compare United States v. Sarubbi, 416 F.Supp. 633 (D.N.J. 1976); with United States v. Hull, 413 F.Supp. 145 (E.D.Tenn. 1976).

Rule 11(e)(1) specifies three types of plea agreements, namely, those in which the attorney for the government might

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

A (B) type of plea agreement is clearly of a different order than the other two, for an agreement to recommend or not to oppose is discharged when the prosecutor performs as he agreed to do By comparison, critical to a type (A) or (C) agreement is that the defendant receive the contemplated charge dismissal or agreed-to sentence. Consequently, there must ultimately be an acceptance or rejction by the court of a type (A) or (C) agreement so that it may be determined whether the defendant shall receive the bargained-for concessions or shall instead be afforded an opportunity to withdraw his plea. But this is not so as to a type (B) agreement; there is no "disposition provided for" in such a plea agreement so as to make the acceptance provisions of subdivision (e)(3) applicable, nor is there a need for rejection with opportunity for withdrawal under subdivision (e)(4) in light of the fact that the defendant knew the nonbinding character of the recommendation or request. United States v. Henderson, 565 F.2d 1119 (9th Cir. 1977); United States v. Savage, 561 F.2d 554 (4th Cir. 1977).

Because a type (B) agreement is distinguishable from the others in that it involves only a recommendation or request not binding upon the court, it is important that the defendant be aware that this is the nature of the agreement into which he has entered. The procedure contemplated by the last sentence of amended subdivision (e)(2) will establish for the record that there is such awareness. This provision conforms to ABA Standards Relating to Pleas of Guilty § 1.5 (Approved Draft, 1968), which provides that "the court must advise the defendant personally that the recommendations of the prosecuting attorney are not binding on the court."

The major objective of the amendment to rule 11(e)(6) is to describe more precisely, consistent with the original purpose of the provision, what evidence relating to pleas or plea discussions is inadmissible. The present language is susceptible to interpretation which would make it applicable to a wide variety of statements made under various circumstances other than within the context of those plea discussions authorized by rule 11(e) and intended to be protected by subdivision (e)(6) of the rule. See United States v. Herman, 544 F.2d 791 (5th Cir. 1977), discussed herein.

Fed.R.Ev. 410, as originally adopted by Pub.L. 93-595, provided in part that "evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal action, case, or proceeding against the person who made the plea or offer." (This rule was adopted with the proviso that it "shall be superseded by any amendment to the Federal Rules of Criminal Procedure which is inconsistent with this rule.") As the Advisory Committee Note explained: "Exclusion of offers to plead guilty or nolo has as its purpose the promotion of disposition of criminal cases by compromise." The amendment of Fed.R.Crim.P. 11, transmitted to Congress by the Supreme Court in April 1974, contained a subdivision (e)(6) essentially identical to the rule 410 language quoted above, as a part of a substantial revision of rule 11. The most significant feature of this revision was the express recognition given to the fact that the "attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching" a plea agreement. Subdivision (e)(6) was intended to encourage such discussions. As noted in H.R. Rep. No. 94-247, 94th Cong., 1st Sess. 7 (1975), the purpose of subdivision (e)(6) is to not "discourage defendants from being completely candid and open during plea negotiations." Similarly, H.R. Rep. No. 94-414, 94th Cong., 1st Sess. 10 (1975), states that "Rule 11(e)(6) deals with the use of statements made in connection with plea agreements." (Rule 11(e)(6) was thereafter enacted, with the addition of the proviso allowing use of statements for purposes of impeachment and in a prosecution for perjury, and with the qualification that the inadmissible statements must also be "relevant to" the inadmissible pleas or offers. Pub.L. 94-64; Fed.R.Ev. 410 was then amended to conform. Pub.L. 94-149.)

While this history shows that the purpose of Fed.R.Ev. 410 and Fed.R.Crim.P. 11(e)(6) is to permit the unrestrained candor which produces effective plea discussions between the "attorney for the government and the attorney for the defendant or the defendant when acting pro se," given visibility and sanction in rule 11(e), a literal reading of the language of these two rules could reasonably lead to the conclusion that a broader rule of inadmissibility obtains. That is, because "statements" are generally inadmissible if "made in connection with, and relevant to" an "offer to plead guilty," it might be thought that an otherwise voluntary admission to law enforcement officals is rendered inadmissible merely because it was made in the hope of obtaining leniency by a plea. Some decisions interpreting rule 11(e)(6) point in this direction. See United States v. Herman, 544 F.2d 791 (5th Cir. 1977) (defendant in custody of two postal inspectors during continuance of removal hearing instigated conversation with them and at some point said he would plead guilty to armed robbery if the murder charge was dropped; one inspector stated they were not "in position" to make any deals in this regard; held, defendant's statement inadmissibile under rule 11(e)(6) because the defendant "made the statements during the course of a conversation in which he sought concessions from the government in return for a guilty plea"); United States v. Brooks, 536 F.2d 1137 (6th Cir. 1976) (defendant telephoned postal inspector and offered to plead guilty if he got 2-year maximum; statement inadmissible).

The amendment makes inadmissible statements made "in the course of or as a consequence of" a later withdrawn guilty plea, a plea of nolo contendere, or "plea discussions with the attorney for the government" which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. It thus fully protects the plea discussion process authorized by rule 11 without attempting to deal with confrontations between suspects and law enforcement agents, which involve problems of quite different dimensions. See, e.g., ALI Model Code of Pre-Arraignment Procedure art. 140 and § 150.2(8) (Proposed Official Draft, 1975) (latter section requires exclusion if "a law enforcement officer induces any person to make a statement by promising leniency"). This change, it must be emphasized, does not compel the conclusion that statements made to law enforcement agents, especially when the agents purport to have authority to bargain, are inevitably admissible. Rather, the point is that such cases are not covered by the per se rule of 11(e)(6) and thus must be resolved by that body of law dealing with police interrogations.

This amendment is fully consistent with all recent and major law reform efforts on this subject. ALI Model Code of Pre-Arraignment Procedure § 350.7 (Proposed Official Draft, 1975), and ABA Standards Relating to Pleas of Guilty § 3.4 (Approved Draft, 1968) both provide:

> Unless the defendant subsequently enters a plea of guilty or nolo contendere which is not withdrawn, the fact that the defendant or his counsel and the prosecuting attorney engaged in plea discussions or made a plea agreement should not be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceedings.

The Commentary to the latter states:

> The above standard is limited to discussions and agreements with the prosecuting attorney. Sometimes defendants will indicate to the police their willingness to bargain, and in such instances these statements are sometimes admitted in court against the defendant. State v. Christian, 245 S.W.2d 895 (Mo. 1952). If the police initiate this kind of discussion, this may have some bearing on the admissibility of the defendant's statement. However, the policy considerations relevant to this issue are better dealt with in the context of standards governing in-custody interrogation by the police.

Similarly, Unif.R.Crim.P. 441(d) (Approved Draft, 1974), provides that except under limited circumstances "no discussion between the parties or statement by the defendant or his lawyer under this Rule," i.e., the rule providing "the parties may meet to discuss the possibility of pretrial diversion * * * or of a plea agreement," are admissible. The amendment is likewise consistent with the typical state provision on this subject; see, e.g., Ill.S.Ct. Rule 402(f).

The "in the course of or as a consequence of such pleas or plea discussions" language of the amendment identifies with more precision than the present language the necessary relationship between the statements and the plea or discussion. See the dispute between the majority and concurring opinion in United States v. Herman, 544 F.2d 791 (5th Cir. 1977), concerning the meanings and effect of the phrases "connection to" and "relevant to" in the present rule. Moreover, by relating the statements to "plea discussions" rather than "an offer to plead," the amendment ensures "that even an attempt to open plea bargaining [is] covered under the same rule of inadmissibility." United States v. Brooks, 536 F.2d 1137 (6th Cir. 1976).

The last sentence of Rule 11(e)(6) is amended to provide a second exception to the general rule of nonadmissibility of the described statements. Under the amendment, such a statement is also admissible "in any proceeding wherein statements made in the course of or as a consequence of the same plea or plea discussions have been introduced." This change is necessary so that, when evidence of statements made in the course of or as a consequence of a certain plea or plea discussions are introduced under circumstances not prohibited by this rule (e.g., not "against" the person who made the plea), other statements relating to the same plea or plea discussions may also be admitted when relevant to the matter at issue. For example, if a defendant upon a motion to dismiss a prosecution on some ground were able to admit certain statements made in aborted plea discussions in his favor, then other relevant statements made in the same plea discussions should be admissible against the defendant in the interest of determining the truth of the matter at issue. This change conforms to the general rule that a privilege terminates when the holder by his own act destroys the confidentiality with which it is endowed. 8 J. Wigmore, Evidence §§ 2242, 2327-2329, 2374, 2389-2390 (McNaughton rev. 1961).

The phrase "in any civil or criminal proceeding" has been moved from its present position, following the word "against," for purposes of clarity. An ambiguity presently exists because the word "against" may be read as referring either to the kind of proceeding in which the evidence is offered or the purpose for which is is offered. The change makes it clear that the latter construction is correct.

Unlike ABA Standards Relating to Pleas of Guilty § 3.4 (Approved Draft, 1968), and ALI Model Code of Pre-Arraignment Procedure § 350.7 (Proposed Official Draft, 1975), rule 11(e)(6) does not also provide that the described evidence is inadmissible "in favor of" the defendant. This is not intended to suggest, however, that such evidence will inevitably be admissible in the defendant's favor. Specifically, no disapproval is intended of such decisions as United States v. Verdoorn, 528 F.2d 103 (8th Cir. 1976), holding that the trial judge properly refused to permit the defendants to put into evidence at their trial the fact the prosecution had attempted to plea bargain with them, as "meaningful dialogue between the parties would, as a practical matter, be impossible if either party had to assume the risk that plea offers would be admissible in evidence."

Rule 17. Subpoena

* * * * * *

(d) INFORMATION NOT SUBJECT TO SUBPOENA. Statements made by ~~government~~ witnesses or prospective ~~government~~ witnesses may not be the subject of subpoena under this rule, but shall be subject to production only in accordance and with the provisions of Rule 26.1.

ADVISORY COMMITTEE NOTE

This change in proposed rule 17(d), appearing in S. 1437, 95th Cong., 1st Sess. (1977) (which redesignates present subdivisions (d) through (g) of the rule as subdivisions (e) through (h), respectively), is necessary in light of the amendment of proposed rule 26.1 to cover statements of defense witnesses as well.

Rule 18. Place of Prosecution and Trial

Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses~~.~~ and the prompt administration of justice.

ADVISORY COMMITTEE NOTE

This amendment is intended to eliminate an inconsistency between rule 18, which in its present form has been interpreted not to allow trial in a division other than that in which the offense was committed except as dictated by the convenience of the defendant and witnesses, Dupoint v. United States, 388 F.2d 39 (5th Cir. 1968), and the Speedy Trial Act of 1974. This Act provides:

> In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

18 U.S.C. § 3161(a). This provision is intended to "permit the trial of a case at any place within the judicial district. This language was included in anticipation of problems which might occur in districts with statutory divisions, where it could be difficult to set trial outside the division." H.R. Rep. No. 93-1508, 93d Cong., 2d Sess. 29 (1974).

The change does not offend the venue provision of the Constitution. "The venue provision of the Sixth Amendment provides only for trial in the district where the crime shall have been committed. There is no reference to a division within a judicial district. * * * The division of a federal judicial district is not a unit of venue in criminal cases." United States v. James, 528 F.2d 999 (5th Cir. 1976). "It follows a fortiori that when a district is not separated into divisions, * * * trial at any place within the district is allowable under the Sixth Amendment * * *." United States v. Fernandez, 480 F.2d 726 (2d Cir. 1973).

Nor is the change inconsistent with the Declaration of Policy in the Jury Selection and Service Act of 1968, which reads:

> It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.

28 U.S.C. § 1861. This language does not mean that the Act requires "the trial court to convene not only in the district but also in the division wherein the offense occurred," as:

> There is no hint in the statutory history that the Jury Selection Act was intended to do more than provide improved judicial machinery so that grand and petit jurors would be selected at random by the use of objective qualification criteria to ensure a representative cross section of the district or division in which the grand or petit jury sits.

United States v. Cates, 485 F.2d 26 (1st Cir. 1974).

The amendment to rule 18 does not eliminate either of the existing considerations which bear upon fixing the place of trial within a district, but simply adds yet another consideration in the interest of ensuring compliance with the requirements of the Speedy Trial Act of 1974. The amendment does not authorize the fixing of the place of trial for yet other reasons. Cf. United States v. Fernandez, 480 F.2d 726 (2d Cir. 1973) (court in the exercise of its supervisory power held improper the fixing of the place of trial "for no apparent reason other than the convenience of the judge").

Rule 26.1. Production of Statements of Witnesses

(A) MOTION FOR PRODUCTION. After a witness other than the defendant ~~called by the government~~ has testified on direct examination, the court, on motion of a party who did not call the witness, ~~the defendant,~~ shall order the attorney for the government or the defendant and his attorney, as the case may be, to produce, for the examination and use of the moving party ~~defendant~~, any statement of the witness that is in ~~the~~ their possession ~~of the United States~~ and that relates to the subject matter concerning which the witness has testified.

(b) PRODUCTION OF ENTIRE STATEMENT. If the entire contents of the statement relate to the subject matter concerning which the witness has testified, the court shall order that the statement be delivered to the moving party ~~defendant~~.

(c) PRODUCTION OF EXCISED STATEMENT. If the other party ~~attorney for the government~~ claims that the statement contains matter that does not relate to the subject matter ~~of the testimony~~ concerning which the witness has testified, the court shall order that it be delivered to the court in camera. Upon inspection, the court shall excise the portions of the statement that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party ~~defendant~~. Any portion of the statement that is withheld from the defendant over his objection shall be preserved by the attorney for the government, and, in the event of a conviction and an appeal by the defendant, shall be made available to the appellate court for the purpose of determining the correctness of the decision to excise the portion of the statement.

(d) RECESS FOR EXAMINATION OF STATEMENT. Upon delivery of the statement to the moving party ~~defendants~~, the court, upon application of that party ~~the defendant~~, may recess proceedings in the trial for the examination of such statement ~~by the defendant~~ and for ~~his~~ preparation for its use in the trial.

(e) SANCTION FOR FAILURE TO PRODUCE STATEMENT. If the other party ~~attorney for the government~~ elects not to comply with an order to deliver a statement to the moving party ~~defendant~~, the court shall order that the testimony of the witness be stricken from the record and that the trial proceed, or, if it is the attorney for the government who elects not to comply, shall declare a mistrial if required by the interest of justice.

(f) DEFINITION. As used in this rule, a "statement" of a ~~government~~ witness means:

(1) a written statement made by the witness that is signed or otherwise adopted or approved by him;

(2) a substantially verbatim recital

of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof; or

(3) a statement, however taken or recorded, or a transcription thereof, made by the witness to a grand jury

ADVISORY COMMITTEE NOTE

This change in proposed rule 26.1, appearing in S. 1437, 95th Cong., 1st Sess. (1977) (which would also repeal Rule 27 and redesignate present Rule 26.1 as Rule 27), is designed to effectuate United States v. Nobles, 422 U.S. 255 (1975), by providing for production of the statements of defense witnesses at trial in essentially the same manner as is now provided for with respect to the statements of government witnesses.

In Nobles, defense counsel sought to introduce the testimony of a defense investigator who prior to trial had interviewed prospective prosecution witnesses and had prepared a report embodying the essence of their conversation. When the defendant called the investigator to impeach eyewitness testimony identifying the defendant as the robber, the trial judge granted the prosecutor the right to inspect those portions of the investigator's report relating to the witnesses' statements, as a potential basis for cross-examination of the investigator. When the defense declined to produce the report, the trial judge refused to permit the investigator to testify. The Supreme Court unanimously upheld the trial court's actions, finding that neither the Fifth nor Sixth Amendments nor the attorney work product doctrine prevented disclosure of such a document at trial. Noting "the federal judiciary's inherent power to require the prosecution to produce the previously recorded statements of its witnesses so that the defense may get the full benefit of cross-examinations and the truth-finding process may be enhanced," the Court rejected the notion "that the Fifth Amendment renders criminal discovery 'basically a one-way street,'" and thus concluded that "in a proper case, the prosecution can call upon that same power for production of witness statements that facilitate 'full disclosure of all the [relevant] facts.'"

The amendment, consistent with the reasoning in Nobles, is designed to place the disclosure of prior relevant statements of a defense witness in the possession of the defense on the same legal footing as is the disclosure of prior statements of prosecution witnesses in the hands of the government under the Jencks Act, 18 U.S.C. § 3500 (to be replaced by proposed Rule 26.1). See United States v. Pulvirenti, 408 F.Supp. 12 (E.D. Mich. 1976), holding that under Nobles "[t]he obligation [of disclosure] placed on the defendant should be the reciprocal of that placed upon the government * * * [as] defined by the Jencks Act." Several state courts have likewise concluded that witness statements in the hands of the defense at trial should be disclosed on the same basis that prosecution witness statements are disclosed, in order to promote the concept of the trial as a search for truth. See, e.g., People v. Sanders, 110 Ill.App. 2d 85, 249 N.E.2d 124 (1969); State v. Montague, 55 N.J. 371, 262 A.2d 398 (1970); People v. Damon, 24 N.Y.2d 256, 299 N.Y.S.2d 830, 247 N.E.2d 651 (1959)

The amendment, with minor exceptions, makes the procedure identical for both prosecution and defense witnesses, including the provision directing the court, whenever a claim is made that disclosure would be improper because the statement contains irrelevant matter, to examine the statements in camera and excise such matter as should not be disclosed. This provision acts as a safeguard against abuse and will enable a defendant who believes that a demand is being improperly made to secure a swift and just resolution of the issue.

The treatment as to defense witnesses of necessity differs slightly from the treatment as to prosecution witnesses in terms of the sanction for a refusal to comply with the court's disclosure order. Under the Jencks Act and proposed Rule 26.1, if the prosecution refuses to abide by the court's order, the court is required to strike the witness's testimony unless in its discretion it determines that the more serious sanction of a mistrial in favor of the accused is warranted. Under the amendment, if a defendant refuses to comply with the court's disclosure order, the court's only alternative is to enter an order striking or precluding the testimony of the witness, as was done in Nobles.

Under subdivision (a) of the rule, the motion for production may be made by "a party who did not call the witness." Thus, it also requires disclosure of statements in the possession of either party when the witness is called neither by the prosecution nor the defense but by the court pursuant to the Federal Rules of Evidence. Present law does not deal with this situation, which consistency requires be treated in an identical manner as the disclosure of statements of witnesses called by a party to the case.

Rule 32. Sentence and Judgment

* * *

(d) WITHDRAWAL OF PLEA OF GUILTY. Upon a motion to withdraw a plea of guilty or nolo contendere, the court may set aside the judgment of conviction and permit withdrawal of the plea ~~may be made only before sentence is imposed or imposition of sentence is suspended, but~~ to correct manifest injustice. ~~the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.~~ If the motion is made before sentence is imposed, before disposition under 18 U.S.C. § 4205(c), or while imposition of sentence is suspended, the court may set aside the judgment of conviction and permit withdrawal of the plea if the defendant shows any fair and just reason and that reason substantially outweighs any prejudice which would result to the government from withdrawal of the plea.

* * *

(f) REVOCATION OF PROBATION. ~~The court shall not revoke probation except after a hearing at which the defendant shall be present and apprised of the grounds on which such action is proposed. The defendant may be admitted to bail pending such hearing.~~

(1) Arrest and Preliminary Hearing. Whenever a probationer is taken into custody on the ground that he has violated a condition of his probation, he shall be afforded a prompt hearing before any judge, or a United States magistrate who has been given authority pursuant to 28 U.S.C. § 636(b) to conduct such hearings, in order to determine whether there is probable cause to hold the probationer for a revocation hearing. The probationer shall be given

(A) notice of the hearing and its purpose and of the alleged violation of probation;

(B) an opportunity to appear at the hearing and present evidence in his own behalf; and

(C) upon request, the opportunity to question witnesses against him unless, for good cause, the federal magistrate decides that justice does not require the appearance of the witness; and

(D) notice of his right to request counsel. Upon the request of the probationer, counsel shall be appointed if it appears that there is an issue of fact as to whether a violation of probation has occurred. If counsel is not appointed upon request, the federal magistrate shall make his reasons for such refusal a matter of record.

The federal magistrate shall maintain a record of what occurs at the hearing.

If he finds probable cause to exist, he shall indicate the evidence which supports such finding and hold the probationer for a revocation hearing before the appropriate judge or United States magistrate. The probationer may be released pursuant to Rule 46(c) pending the revocation hearing. If the federal magistrate does not find probable cause to exist, the proceedings shall be dismissed and the federal magistrate who issued the warrant shall be immediately notified of such discharge. A copy of the written report of the hearing shall be transmitted to the district of probation jurisdiction.

(2) Revocation Hearing. The revocation hearing, unless waived by the probationer, shall be held within a reasonable time before the judge or United States magistrate of the district of probation jurisdiction. The probationer shall be given

(A) written notice of the alleged violation of probation;

(B) disclosure of the evidence against him;

(C) an opportunity to appear and to present evidence in his own behalf;

(D) the opportunity to question witnesses against him unless, for good cause, the federal magistrate decides that justice does not require the appearance of the witness; and

(E) notice of his right to request counsel. Upon the request of the probationer, counsel shall be appointed if it appears that there is an issue of fact as to whether a violation of probation has occurred or if there is a question as to whether, assuming a violation, it is in the public interest to revoke probation. If counsel is not appointed upon request, the federal magistrate shall make his reasons for such refusal a matter of record.

(3) Review of Revocation. A decision of a United States magistrate to revoke proba-

tion shall be subject to review upon appeal to the court of appeals.

(g) MODIFICATION OF PROBATION. A hearing and assistance of counsel are required before the terms or conditions of probation can be modified, unless the relief granted to the probationer upon his request or the court's own motion is favorable to him.

ADVISORY COMMITTEE NOTE

The first part of this amendment is intended to clarify rule 32(d), which has been the source of considerable confusion. In its present form, the rule declares that a motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed, but then states the standard for permitting withdrawal *after* sentence. In fact, "there is no limitation upon the time within which relief thereunder may, after sentencing, be sought." *United States* v. *Watson*, 548 F.2d 1058 (D.C.Cir. 1977). It has been critically stated that "the Rule offers little guidance as to the applicable standard for a pre-sentence withdrawal of plea," *United States* v. *Michaelson*, 552 F.2d 472 (2d Cir. 1977), and that as a result "the contours of [the presentence] standard are not easily defined." *Bruce* v. *United States*, 379 F.2d 113 (D.C.Cir. 1967).

The first sentence of amended rule 32(d) retains the "manifest injustice" standard, which is stated in the present rule as the post-sentence test but which, if met, has been deemed a basis for withdrawal whether the application comes before or after sentence. Note, 64 Yale L.J. 590 (1955). The most common instances of "manifest injustice" are where there has been an "improper taking of a guilty plea" in significant noncompliance with rule 11, United States v. Watson, supra; where it is shown that the defendant was without competence to plead, United States v. Masthers, 539 F.2d 721 (D.C. Cir. 1976); and where a plea bargain has not been kept, United States v. Crusco, 536 F.2d 21 (3d Cir. 1976). (Not every deviation from rule 11 constitutes "manifest injustice or even a "fair and just" reason for presentence withdrawal, United States v. Saft, 558 F.2d 1073 (2d Cir. 1977); United States v. Michaelson, supra.) Where the defect in the plea is of this magnitude (as compared to those defects which meet only the lesser standard of the second sentence), there is no occasion to balance that defect against the prejudice to the government from plea withdrawal.

The second sentence of the amended rule authorizes a court to permit plea withdrawal under a lesser standard before sentence is imposed, while imposition of sentence is suspended, and before disposition under 18 U.S.C. § 4205(c). The latter of these has been added to the rule to make it clear that the lesser standard also governs prior to the second stage of sentencing when the judge, pursuant to that statute, has committed the defendant to the custody of the Attorney General for study pending final disposition. Several circuits have left this issue open, e.g., United States v. McCoy, 477 F.2d 550 (5th Cir. 1973); Callaway v. United States, 367 F.2d 140 (10th Cir. 1966,: while some have held that a withdrawal motion filed between tentative and final sentencing should be judged against the presentence standard, United States v. Barker, 514 F.2d 208 (D.C.Cir. 1975); United States v. Thomas, 415 F.2d 1216 (9th Cir. 1969).

Inclusion of the § 4205(c) situation under the presentence standard is appropriate. As explained in Barker:

> Two reasons of policy have been advanced to explain the near-presumption which Rule 32(d) erects against post-sentence withdrawal motions. The first is that post-sentence withdrawal subverts the "stability" of "final judgments." * * * The second reason is that the post-sentence withdrawal motion often constitutes a veiled attack on the judge's sentencing decision; to grant such motions in lenient fashion might
>
>> undermine respect for the courts and fritter away the time and painstaking effort devoted to the sentencing process.
>
> * * * Concern for the "stability of final judgments" has little application to withdrawal motions filed between tentative and final sentencing under Section 4208(b) [now 4205(c)]. The point at which a defendant's judgment of conviction becomes "final" for purposes of appeal -- whether at tentative or at final sentencing -- is wholly within the defendant's discretion. * * * Concern for the integrity of the sentencing process is, however, another matter. The major point, in our view, is that tentative sentencing under Section 4208(b) [now 4205(c)] leaves the defendant ignorant of his final sentence. He will therefore be unlikely to use a withdrawal motion as an oblique attack on the judge's sentencing policy. The relative leniency of the "fair and just" standard is consequently not out of place.

The second sentence of the amended rule incorporates the "fair and just" standard which the federal courts, relying upon dictum in Kercheval v. United States, 274 U.S. 220, 47 S.Ct. 582, 71 L.Ed. 1009 (1927), have consistently applied to presentence motions. See, e.g., United States v. Strauss, 563 F.2d 127 (4th Cir. 1977); United States v. Bradin, 535 F.2d 1039 (8th Cir. 1976); United States v. Barker, supra. Under the rule as amended, the defendant first has the burden of showing a "fair and just" reason for withdrawal of the plea. This is consistent with the prevailing view, which is that "the defendant has the burden of satisfying the trial judge that there are valid grounds for withdrawal," see United States v. Michaelson, supra, and cases cited therein. (Illustrative of a reason which would meet this test but would likely fall short of the "manifest injustice" test is where the defendant now wants to pursue a certain defense which he for good reason did not put forward earlier, United States v. Barker, supra.)

Although "the terms 'fair and just' lack any pretense of scientific exactness," United States v. Barker, supra, guidelines have emerged in the appellate cases for applying this standard. Whether the movant has asserted his legal innocence is an important factor to be weighed, United States v. Joslin, 434 F.2d 526 (D.C.Cir. 1970), as is the reason why the defenses were not put forward at the time of original pleading. United States v. Needles, 472 F.2d 652 (2d Cir. 1973). The amount of time which has passed between the plea and the motion must also be taken into account.

> A swift change of heart is itself strong indication that the plea was entered in haste and confusion * * *. By contrast, if the defendant has long delayed his withdrawal motion, and has had the full benefit of competent counsel at all times, the reasons given to support withdrawal must have considerably more force.

United States v. Barker, supra.

If the defendant establishes such a reason, it is then appropriate to consider whether the government would be prejudiced by withdrawal of the plea. Substantial prejudice may be present for a variety of reasons. See *United States* v. *Jerry*, 487 F.2d 600 (3d Cir. 1973) (physical evidence had been discarded); *United States* v. *Vasquez-Velasco*, 471 F.2d 294 (9th Cir. 1973) (death of chief government witness); *United States* v. *Lombardozzi*, 436 F.2d 878 (2d Cir. 1971) (other defendants with whom defendant had been joined for trial had already been tried in a lengthy trial); *Farnsworth* v. *Sanford*, 115 F.2d 375 (5th Cir. 1940) (prosecution had dismissed 52 witnesses who had come from all over the country and from overseas bases).

There is currently some disparity in the manner in which presentence motions to withdraw a guilty plea are dealt with. Some courts proceed as if any desire to withdraw the plea before sentence is "fair and just" so long as the government fails to establish that it would be prejudiced by the withdrawal. Illustrative is *United States* v. *Savage*, 561 F.2d 554 (4th Cir. 1977), where the defendant pleaded guilty pursuant to a plea agreement that the government would recommend a sentence of 5 years. At the sentencing hearing, the trial judge indicated his unwillingness to follow the government's recommendation, so the defendant moved to withdraw his plea. That motion was denied. On appeal, the court held that there had been no violation of rule 11, in that refusal to accept the government's recommendation does not constitute a rejection of the plea agreement. But the court then proceeded to hold that absent any showing of prejudice by the government, "the defendant should be allowed to withdraw his plea"; only upon such a showing by the government must the court "weigh the defendant's reasons for seeking to withdraw his plea against the prejudice which the government will suffer." The other view is that there is no occasion to inquire into the matter of prejudice unless the defendant first shows a good reason for being allowed to withdraw his plea. As stated in United States v. Saft, 558 F.2d 1073 (2d Cir. 1977): "The Government is not required to show prejudice when a defendant has shown no sufficient grounds for permitting withdrawal of a guilty plea, although such prejudice may be considered by the district court in exercising its discretion." The second sentence of the amended rule, by requiring that the defendant first show a "fair and just" reason, after which those reasons are weighed against the prejudice which would result from withdrawal, adopts the Saft position and rejects that taken in Savage.

The Savage position, as later articulated in United States v. Strauss, supra, is that the "sounder view, supported by both the language of the rule and by the reasons for it, would be to allow withdrawal of the plea prior to sentencing unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea." (Quoting 2 C. Wright, Federal Practice and Procedure § 538, at 474-75 (1969).) Although that position may once have been sound, this is no longer the case in light of the recent revisions of rule 11. Rule 11 now provides for the placing of plea agreements on the record, for full inquiry into the voluntariness of the plea, for detailed advice to the defendant concerning his rights and the consequences of his plea and a determination that the defendant understands these matters, and for a determination of the accuracy of the plea. Given the great care with which pleas are taken under this revised rule 11, there is no reason to view pleas so taken as merely "tentative," subject to withdrawal before sentence whenever the government cannot establish prejudice.

> Were withdrawal automatic in every case where the defendant decided to alter his tactics and present his theory of the case to the jury, the guilty plea would become a mere gesture, a temporary and meaningless formality reversible at the defendant's whim. In fact, however, a guilty plea is no such trifle, but "a grave and solemn act," which is "accepted only with care and discernment."

United States v. Barker, supra, quoting from Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970).

The facts of the Savage case reflect the wisdom of this position. In Savage, the defendant had entered into a plea agreement whereby he agreed to plead guilty in exchange for the government's promise to recommend a sentence of 5 years, which the defendant knew was not binding on the court. Yet, under the approach taken in Savage, the defendant remains free to renege on his plea bargain, notwithstanding full compliance therewith by the attorney for the government, if it later appears to him from the presentence report or the comments of the trial judge or any other source that the court will not follow the government's recommendation. Having bargained for a recommendation pursuant to rule 11(e)(1)(B), the defendant should not be entitled, in effect, to unilaterally convert the plea agreement into a rule 11(e)(1)(C) type of agreement (i.e., one with a guarantee of a specific sentence which, if not given, permits withdrawal of the plea).

Subdivision (f) is revised to conform the rule to the requirements of Morrissey v. Brewer, 408 U.S. 471 (1972), and Gagnon v. Scarpelli, 411 U.S. 778 (1973). Since these decisions, it is clear that a probationer can no longer be denied due process in reliance on the dictum in Escoe v. Zerbst, 295 U.S. 490, 492 (1935), that probation is an "act of grace." See Van Alstyne, The Demise of the Right-Privilege

Distinction in Constitutional Law, 81 Harv.L. Rev. 1439 (1968); President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections 86 (1967).

Subdivision (f)(1) requires, consistent with the holding in Scarpelli, that a prompt preliminary hearing must be held whenever "a probationer is taken into custody on the ground that he has violated a condition of his probation." See 18 U.S.C. § 3653 regarding arrest of the probationer with or without a warrant. If there is to be a revocation hearing but there has not been a taking of custody for a probation violation, there need not be a preliminary hearing.

> The Supreme Court in Morrissey and Gagnon relied on the fact that revocation of parole or probation in the normal case operated to deprive the person affected of "many of the core values of unqualified liberty" and "inflicts a 'grievous loss' on the parolee [or probationer] and often on others." 408 U.S. at 482, 92 S.Ct. at 2601. That is, in the typical case of revocation of probation or parole, the probationer or parolee has been released from incarceration and is at liberty when the revocation proceeding begins. Accordingly, revocation of his probation or parole does deprive him immediately of his liberty. It was this deprivation which prompted the Court to determine that a preliminary as well as a final revocation hearing was required to afford the petitioner due process of law.

United States v. Tucker, 524 F.2d 77 (5th Cir. 1975). Consequently, a preliminary hearing need not be held if the probationer was at large and was not arrested but was allowed to appear voluntarily, United States v. Strada, 503 F.2d 1081 (8th Cir. 1974), or in response to a show cause order which "merely requires his appearance in court," United States v. Langford, 369 F.Supp. 1107 (N.D.Ill. 1973), or if the probationer was in custody pursuant to a new charge, Thomas v. United States, 391 F.Supp. 202 (W.D.Pa. 1975), or pursuant to a final conviction of a subsequent offense, United States v. Tucker, supra.

Presumably, most revocation hearings will be conducted by the United States magistrate, as defined in rule 54. His authority to conduct such hearings is derived from 28 U.S.C. § 636(b), which states that a district court can assign duties to the United States magistrate which "are not inconsistent with the Constitution and laws of the United States."

Subdivision (f)(1)(A), (B) and (C) list the requirements for the preliminary hearing, as developed in Morrissey and made applicable to probation revocation cases in Scarpelli. Under (A), the probationer is to be given notice of the hearing and its purpose and of the alleged violation of probation. "Although the allegations in a motion to revoke probation need not be as specific as an indictment, they must be sufficient to apprise the probationer of the conditions of his probation which he is alleged to have violated, as well as the dates and events which support the charge." Kartman v. Parratt, 397 F.Supp. 531 (D. Nebr. 1975). Under (B), the probationer is permitted to appear and present evidence in his own behalf. And under (C), upon request by the probationer, adverse witnesses shall be made available for questioning unless the magistrate determines that the informant would be subjected to risk of harm if his identity were disclosed.

Subdivision (f)(1)(D) provides for notice to the probationer of his right to request counsel for the preliminary hearing. As stated in Scarpelli:

> The facts and circumstances in preliminary and final hearings are susceptible of almost infinite variation, and a considerable discretion must be allowed the responsible agency in making the decision. Presumptively, it may be said that counsel

> should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty . . . . In every case in which a request for counsel at a preliminary or final hearing is refused, the grounds for refusal should be stated succinctly in the record.

The federal magistrate (see definition in rule 54(c) is to keep a record of what transpires at the hearing and, if he finds probable cause of a violation, indicate the evidence which supports such finding and hold the probationer for a revocation hearing before the appropriate federal magistrate. The probationer may be released pursuant to rule 46(c) pending the revocation hearing. If the federal magistrate does not find probable cause of a violation to exist, the federal magistrate who issued the warrant shall be immediately notified of such discharge by the most expeditious means. This allows a superseding warrant to issue if further facts are by then available. It also allows the court to modify probation if that course is appropriate; see new subdivision (g). A copy of the written report of the hearing should be transmitted to the court having jurisdiction of the probationer, for this will advise all concerned of the disposition of the preliminary hearing.

Subdivision (f)(2) mandates a final revocation hearing within a reasonable time to determine whether the probationer has, in fact, violated the conditions of his probation and whether his probation should be revoked. The final revocation hearing should be held before the magistrate or judge of the district of probation jurisdiction who has the most complete information concerning the reasons for placing the offender on probation.

The present rule does not specify the manner of conducting such a hearing, and practice in the federal courts has varied. Rezneck, The New Federal Rules of Criminal Procedure, 54 Geo.L.J. 1276, 1316 (1966). The hearing now required by rule 32(f) is not a formal trial; the usual rules of evidence need not be applied. See Morrissey v. Brewer, supra ("the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial"); rule 1101(d)(3) of the Federal Rules of Evidence (rules not applicable to proceedings "granting or revoking probation").

> A revocation of probation is an exercise of broad discretionary power by the trial court akin to that utilized in imposing the probated sentence initially. Evidence that would establish guilt beyond a reasonable doubt is not required to support an order revoking probation. Probably evidence rising to the level of substantial evidence is not even required, absent arbitrary and capricious action in the revocation. All that is required is that the evidence and facts be such as to reasonably satisfy the judge that the conduct of the probationer has not been as good as required by the conditions of probation.

United States v. Francischine, 512 F.2d 827 (5th Cir. 1975).

This hearing may be, and often is, waived by the probationer in both federal and state practice. R. E. McCauley, Deputy Administrator, Wisconsin Division of Corrections, said in an interview that about fifty percent of those charged with a violation of their probation admit the charges and waive their right to a hearing. Note, Probation Revocation -- Right to a Hearing -- Right to Counsel, 1971 Wis. L. Rev. 648, 652. This high percentage may be due to a number of factors: (1) the accuracy of the charges; (2) many state statutes provide that the time which a probationer must serve in prison, if revocation occurs, does not begin until he enters prison, so that persons with short terms may wish to begin serving their term immediately rather than waiting for the revocation hearing; (3) for the older juvenile, the waiver may prevent his having an adult criminal record.

Subdivisions (f)(2)(A)-(E) list the minimum requirements of due process to which a probationer is entitled at the final revocation hearing. The final hearing is less a summary one because the decision under consideration is the ultimate decision to revoke rather than a mere determination of probable cause. Thus, the probationer has certain rights not granted at the preliminary hearing: (i) the notice under (A) must be written; (ii) under (B) disclosure of all the evidence against the probationer is required; and (iii) under (D) the probationer does not have to specifically request the right to confront adverse witnesses.

Under subdivision (f)(2)(E) the probationer must be given notice of his right to request counsel. The Court in Scarpelli stated that

> counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present.

Scarpelli further requires that if a request for counsel is refused, "the grounds for refusal should be stated succinctly in the record."

Notwithstanding the provision in subdivision (f)(2)(E), counsel is required at sentencing if imposition of sentence was previously suspended and probation is revoked and a sentence then imposed. Mempa v. Rhay, 389 U.S. 128 (1967).

Revocation of probation is proper if the federal magistrate finds a violation of the conditions of probation and that such violation warrants revocation. Revocation followed by imprisonment is an appropriate disposition if the court finds on the basis of the original offense and the intervening conduct of the probationer that:

(i) confinement is necessary to protect the public from further criminal activity by the offender; or

(ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or

(iii) it would unduly depreciate the seriousness of the violation if probation were not revoked.

See American Bar Association, Standards Relating to Probation § 5.1 (Approved Draft, 1970).

If probation is revoked, the probationer may be required to serve the sentence originally imposed, or any lesser sentence, and if imposition of sentence was suspended he may receive any sentence which might have been imposed. 18 U.S.C. § 3653. When a split sentence is imposed under 18 U.S.C. § 3651 and probation is subsequently revoked, the probationer is entitled to credit for the time served in jail but not for the time he was on probation. Thomas v. United States, 327 F.2d 795 (10th Cir.), cert. denied 377 U.S. 1000 (1964); Schley v. Peyton, 280 F.Supp. 307 (W.D.Va.1968).

Subdivision (f)(3) deals with review of the decision to revoke probation. In all cases of conviction by a United States magistrate, an appeal of right lies from the judgment of the magistrate to a judge of the district court of the district in which the offense was committed.

18 U.S.C. § 3402. With respect to the procedures upon such an appeal and the scope of the appeal, see rule 8 of the Rules of Procedure for the Trial of Minor Offenses before United States Magistrates. Appeal from a decision to revoke by a judge of the district court is to the court of appeals. On review, an action revoking probation will not be disturbed in the absence of a clear showing of abuse of discretion. United States v. Franchischine, 512 F.2d 827 (5th Cir. 1975).

Subdivision (g) is added to include proceedings on modification of probation (as provided for in 18 U.S.C. § 3651). The probationer should have the right to apply to the sentencing court for a clarification or change of conditions. American Bar Association, Standards Relating to Probation § 3.1(c) (Approved Draft, 1970). This avenue is important for two reasons: (1) the probationer should be able to obtain resolution of a dispute over an ambiguous term or the meaning of a condition without first having to violate it; and (2) in cases of neglect, overwork, or simply unreasonableness on the part of the probation officer, the probationer should have recourse to the sentencing court when a condition needs clarification or modification.

Probation conditions should be subject to modification, for the sentencing court must be able to respond to changes in the probationer's circumstances as well as new ideas and methods of rehabilitation. See generally ABA Standards, supra, §3.3. The sentencing court is given the authority to shorten the term or end probation early upon its own motion without a hearing. And while the modification of probation is a part of the sentencing procedure, so that the probationer is ordinarily entitled to a hearing and presence of counsel, a modification favorable to the probationer may be accomplished without a hearing in the presence of defendant and counsel. United States v. Bailey, 343 F.Supp. 76 (W.D.Mo. 1971).

Rule 35. Correction or Reduction of Sentence

(a) CORRECTION OF SENTENCE. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

(b) REDUCTION OF SENTENCE. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law. Changing a sentence from a sentence of incarceration to a sentence of probation shall constitute a permissible reduction of sentence under this subdivision.

ADVISORY COMMITTEE NOTE

Rule 35 is amended in order to make it clear that a judge may, in his discretion, reduce a sentence of incarceration to probation. To the extent that this permits the judge to grant probation to a defendant who has already commenced service of a term of imprisonment, it represents a change in the law. See *United States* v. *Murray*, 275 U.S. 347 (1928) (Probation Act construed not to give power to district court to grant probation to convict after beginning of service of sentence, even in the same term of court); *Affronti* v. *United States*, 350 U.S. 79 (1955) (Probation Act construed to mean that after a sentence of consecutive terms on multiple counts of an indictment has been imposed and service of sentence for the first such term has commenced, the district court may not suspend sentence and grant probation as to the remaining term or terms). In construing the statute in *Murray* and *Affronti*, the Court concluded Congress could not have intended to make the probation provisions applicable during the *entire* period of incarceration (the only other conceivable interpretation of the statute), for this would result in undue duplication of the three methods of mitigating a sentence - probation, pardon and parole - and would impose upon district judges the added burden of responding to probation applications from prisoners throughout the service of their terms of imprisonment. Those concerns do not apply to the instant provisions, for the reduction may occur only within the time specified in subdivision (b). This change gives "meaningful effect" to the motion-to-reduce remedy by allowing the court "to consider all alternatives that were available at the time of imposition of the original sentence." *United States* v. *Golphin*, 362 F.Supp. 698 (W.D. Pa. 1973).

In some instances, the amendment may result in a split sentence of incarceration and probation differing from that presently authorized under 18 U.S.C. § 3651. This could occur, for example, when the reduction to a sentence of probation occurs after the defendant has been incarcerated more than six months.

Rule 40. Commitment to Another District

(a) APPEARANCE BEFORE FEDERAL MAGISTRATE.

If a person is arrested on a warrant in a district other than that in which the offense is alleged to have been committed, he shall be taken without unnecessary delay before the nearest available federal magistrate. Preliminary proceedings concerning the defendant shall be conducted in accordance with Rules 5 and 5.1, except that if no preliminary examination is held because an indictment has been returned or an information filed or because the defendant elects to have the preliminary examination conducted in the district in which the prosecution is pending, the person shall be held to answer upon a finding that he is the person named in the indictment, information or warrant. If the defendant is held to answer, he shall be held to answer in the district court in which the prosecution is pending, provided that a warrant is issued in that district if the arrest was made without a warrant.

(b) STATEMENT BY FEDERAL MAGISTRATE. In addition to the statements required by Rule 5, the federal magistrate shall inform the defendant of the provisions of Rule 20.

(c) BAIL. The federal magistrate before whom a defendant is brought pursuant to subdivision (a) of this rule shall authorize his release under the terms provided for by these rules and by 18 U.S.C. § 3146 and § 3148. If bail was previously fixed in the district where the warrant, information or indictment issued, the federal magistrate shall take into account the amount of bail previously fixed and the reasons set forth therefor, if any, but shall not be bound by the amount of bail previously fixed. If the federal magistrate fixes bail different from that previously fixed, he shall set forth the reasons for his action in writing.

(d) PAPERS. If a defendant is held or discharged, the papers in the proceeding and any bail taken shall be transmitted to the clerk of the district court in which the prosecution is pending.

(e) ARREST OF PROBATIONER. If a person is arrested for a violation of his probation in a district other than the district of supervision, he shall be taken without unnecessary delay before the nearest available federal magistrate. The federal magistrate shall:

(1) Proceed in accordance with Rule 32(f) if jurisdiction over the probationer is transferred to that district pursuant to 18 U.S.C. § 3653;

(2) Hold a prompt preliminary hearing in accordance with Rule 32(f)(1) if

the alleged violation occurred in that district, and, if the probationer is held to answer, hold him to answer in the district court of the district having probation supervision; or

(3) Otherwise order the probationer held to answer in the district court of the district having probation jurisdiction upon production of certified copies of the probation order, the warrant, and the application for the warrant, and upon a finding that the person before him is the person named in the warrant.

(f) ARREST FOR FAILURE TO APPEAR. If a person is arrested on a warrant in a district other than that in which the warrant was issued, and the warrant was issued because of the failure of the person named therein to appear as required pursuant to a subpoena or the terms of his release, the person arrested shall be taken without unnecessary delay before the nearest available federal magistrate. Upon production of the warrant or a certified copy thereof and upon a finding that the person before him is the person named in the warrant, the federal magistrate shall hold the person to answer in the district in which the warrant was issued.

ADVISORY COMMITTEE NOTE

This substantial revision of rule 40 abolishes the present distinction between arrest in a nearby district and arrest in a distant district, clarifies the authority of the magistrate with respect to the setting of bail where bail had previously been fixed in the other district, adds a provision dealing with arrest of a probationer in a district other than the district of supervision, and adds a provision dealing with arrest of a defendant or witness for failure to appear in another district.

Under subdivision (a) of the present rule, if a person is arrested in a nearby district (another district in the same state, or a place less than 100 miles away), the usual rule 5 and 5.1 preliminary proceedings are conducted. But under subdivision (b) of the present rule, if a person is arrested in a distant district, then a hearing leading to a warrant of removal is held. New subdivision (a) would make no distinction between these two situations and would provide for rule 5 and 5.1 proceedings in all instances in which the arrest occurs outside the district where the warrant issues or where the offense is alleged to have been committed.

This abolition of the distinction between arrest in a nearby district and arrest in a distant district rests upon the conclusion that the procedures prescribed in rules 5 and 5.1 are adequate to protect the rights of an arrestee wherever he might be arrested. If the arrest is without a warrant, it is necessary under rule 5 that a complaint be filed forthwith complying with the requirements of rule 4(a) with respect to the showing of probable cause. If the arrest is with a warrant, that warrant will have been issued upon the basis of an indictment or of a complaint or information showing probable cause, pursuant to rules 4(a) and 9(a). Under rule 5.1, dealing with the preliminary examination, the defendant is to be held to answer only upon a showing of probable cause that an offense has been committed and that the defendant committed it.

Under subdivision (a), there are two situations in which no preliminary examination will be held. One is where "an indictment has been returned or an information filed," which pursuant to rule 5(c) obviates the need for a preliminary examination. The other is where "the defendant elects to have the preliminary examination conducted in the district in which the prosecution is pending." A defendant might wish to elect that alternative when, for example, the law in that district is that the complainant and other material witnesses may be required to appear at the preliminary examination and give testimony. See Washington v. Clemmer, 339 F.2d 715 (D.C. Cir. 1964).

New subdivision (a) continues the present requirement that if the arrest was without a warrant a warrant must thereafter issue in the district in which the offense is alleged to have been committed. This will ensure that in the district of anticipated prosecution there will have been a probable cause determination by a magistrate or grand jury.

New subdivision (b) follows existing subdivision (b)(2) in requiring the magistrate to inform the defendant of the provisions of rule 20 applicable in the particular case. Failure to so notify the defendant should not invalidate the proceedings.

The first sentence of new subdivision (c) conforms to present subdivision (b)(2). The second sentence is intended to clarify the situation in which a defendant makes his initial appearance before the United States magistrate and there is a warrant issued by a judge of a different district who has endorsed the amount of bail on the warrant. The present ambiguity of the rule is creating practical administrative problems. If the United States magistrate concludes that a lower bail is appropriate, the judge who fixed the original bail on the warrant has, on occasion, expressed the view that this is inappropriate conduct by the magistrate. If the magistrate, in such circumstances, does not reduce the bail to the amount supported by all of the facts, there may be caused unnecessary inconvenience to the defendant, and there would arguably be a violation of at least the spirit of the Bail Reform Act and the Eighth Amendment.

The Procedures Manual for United States Magistrates, issued under the authority of the Judicial Conference of the United States, provides in ch. 6, pp. 8-9:

> Where the arrest occurs in a "distant" district, the rules do not expressly limit the discretion of the magistrate in the setting of conditions of release. However, whether or not the magistrate in the district of arrest has authority to set his own bail under Rule 40, considerations of propriety and comity would dictate that the magistrate should not attempt to set bail in a lower amount than that fixed by

> a judge in another district. If an unusual situation should arise where it appears from all the information available to the magistrate that the amount of bail endorsed on the warrant is excessive, he should consult with a judge of his own district or with the judge in the other district who fixed the bail in order to resolve any difficulties. (Where an amount of bail is merely recommended on the indictment by the United States attorney, the magistrate has complete discretion in setting conditions of release.)

Rule 40 as amended would encourage the above practice and hopefully would eliminate the present confusion and misunderstanding.

The third sentence of subdivision (c) requires that the magistrate set forth the reasons for his action in writing whenever he fixes bail in an amount different from that previously fixed. Setting forth the reasons for the amount of bail fixed, certainly a sound practice in all circumstances, is particularly appropriate when the bail differs from that previously fixed in another district. The requirement that reasons be set out will ensure that the "considerations of propriety and comity" referred to above will be specifically taken into account.

New subdivision (e) has no counterpart in the present rule. It provides a procedure for dealing with the situation in which a probationer is arrested in a district other than the district of supervision, consistent with 18 U.S.C. § 3653, which provides in part:

> If the probationer shall be arrested in any district other than that in which he was last supervised, he shall be returned to the district in which the warrant was issued, unless jurisdiction over him is transferred as above provided to the district in which he is found, and in that case he shall be detained pending further proceedings in such district.

One possibility, provided for in subdivision (e)(1), is that of transferring jurisdiction over the probationer to the district in which he was arrested. This is permissible under the aforementioned statute, which provides in part:

> Whenever during the period of his probation, a probationer heretofore or hereafter placed on probation, goes from the district in which he is being supervised to another district, jurisdiction over him may be transferred, in the discretion of the court, from the court for the district from which he goes to the court for the other district, with the concurrence of the latter court. Thereupon the court for the district to which jurisdiction is transferred shall have all power with respect to the probationer that was previously possessed by the court for the district from which the transfer is made, except that the period of probation shall not be changed without the consent of the sentencing court. This process under the same conditions may be repeated whenever during the period of his probation the probationer goes from the district in which he is being supervised to another district.

Such transfer may be particularly appropriate when it is found that the probationer has now taken up residence in the district where he was arrested or where the alleged occurrence deemed to constitute a violation of probation took place in the district of arrest. In current practice, probationers arrested in a district other than that of their present supervision are sometimes unnecessarily returned to the district of their supervision, at considerable expense and loss of time, when the more appropriate course of action would have been transfer of probation jurisdiction.

Subdivisions (e)(2) and (3) deal with the situation in which there is not a transfer of probation jurisdiction to the district of arrest. If the alleged probation violation occurred in the district of arrest, then, under subdivision (e)(2), the preliminary hearing provided for in rule 32(f)(1) is to be held in that district. This is consistent with the reasoning in Morrissey v. Brewer, 408 U.S. 471 (1972), made applicable to probation cases in Gagnon v. Scarpelli, 411 778 (1973), where the Court stressed that often a parolee "is arrested at a place distant from the state institution, to which he may be returned before the final decision is made concerning revocation," and cited this as a factor contributing to the conclusion that due process requires "that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available." As later noted in Gerstein v. Pugh, 420 U.S. 103 (1975):

> In Morrissey v. Brewer * * * and Gagnon v. Scarpelli * * * we held that a parolee or probationer arrested prior to revocation is entitled to an informal preliminary hearing at the place of arrest, with some provision for live testimony. * * * That preliminary hearing, more than the probable cause determination required by the Fourth Amendment, serves the purpose of gathering and preserving live testimony, since the final revocation hearing frequently is held at some distance from the place where the violation occurred.

However, if the alleged violation did not occur in that district, then first-hand testimony concerning the violation is unlikely to be available there, and thus the reasoning of Morrissey and Gerstein does not call for holding the preliminary hearing in that district.

In such a case, as provided in subdivision (e)(3), the probationer should be held to answer in the district court of the district having probation jurisdiction. The purpose of the proceeding there provided for is to ascertain the identity of the probationer and provide him with copies of the warrant and the application for the warrant. A probationer is subject to the reporting condition at all times and is also subject to the continuing power of the court to modify such conditions. He therefore stands subject to return back to the jurisdiction district without the necessity of conducting a hearing in the district of arrest to determine whether there is probable cause to revoke his probation.

New subdivision (f) has no counterpart in the present rule. It has been added because some confusion currently exists as to whether present rule 40(b) is applicable to the case in which a bench warrant has issued for the return of a defendant or witness who has absented himself and that person is apprehended in a distant district. In Bandy v. United States, 408 F.2d 518 (8th Cir. 1969), a defendant, who had been released upon his personal recognizance after conviction and while petitioning for certiorari and who failed to appear as required after certiorari was denied, objected to his later arrest in New York and removal to Leavenworth without compliance with the rule 40 procedures. The court concluded:

> The short answer to Bandy's first argument is found in Rush v. United States, 290 F.2d 709, 710 (5 Cir. 1961): "The provisions of Rules 5 and 40, Federal Rules of Criminal Procedure, 18 U.S.C.A. may not be availed of by a prisoner in escape status * * *." As noted by Holtzoff, "Removal of Defendants in Federal Criminal Procedure", 4 F.R.D. 455, 458 (1946):

> > "Resort need not be had, however, to this [removal] procedure for the purpose of returning a prisoner who has been recaptured after an escape from custody. It has been pointed out that in such a case the court may summarily direct his return under its general power to issue writs not specifically provided for by statute, which may be necessary for the exercise of its jurisdiction and agreeable to the usages and principles of law. In fact, in such a situation no judicial process appears necessary. The prisoner may be retaken and administratively returned to the custody from which he escaped."
>
> Bandy's arrest in New York was pursuant to a bench warrant issued by the United States District Court for the District of North Dakota on May 1, 1962, when Bandy failed to surrender himself to commence service of his sentence on the conviction for filing false income tax refunds. As a fugitive from justice, Bandy was not entitled upon apprehension to a removal hearing, and he was properly removed to the United States Penitentiary at Leavenworth, Kansas to commence service of sentence.

Consistent with Bandy, new subdivision (f) does not afford such a person all of the protections provided for in subdivision (a). However, subdivision (f) does ensure that a determination of identity will be made before that person is held to answer in the district of arrest.

Rule 41. Search and Seizure

(a) AUTHORITY TO ISSUE WARRANT. A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property or person sought is located, upon request of a federal law enforcement officer or an attorney for the government.

(b) OBJECTS ~~PROPERTY~~ WHICH MAY BE SEIZED WITH A WARRANT. A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense~~.~~ ; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.

(c) ISSUANCE AND CONTENTS.

(1) Warrant Upon Affidavit. A warrant other than a warrant upon oral testimony under paragraph (2) of this subdivision shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the

affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property or person specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

* * *

ADVISORY COMMITTEE NOTE

This amendment to Rule 41 is intended to make it possible for a search warrant to issue to search for a person under two circumstances: (i) when there is probable cause to arrest that person; or (ii) when that person is being criminally restrained. There may be instances in which a search warrant would be required to conduct a search in either of these circumstances. Even when a search warrant would not be required to enter a place to search for a person, a procedure for obtaining a warrant should be available so that law enforcement officers will be encouraged to resort to the preferred alternative of acquiring "an objective predetermination of probable cause," Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), in this instance, that the person sought is at the place to be searched.

That part of the amendment which authorizes issuance of a search warrant to search for a person unlawfully restrained is consistent with ALI Model Code of Pre-Arraignment Procedure § SS 210.3(1)(d) (Proposed Official Draft, 1975), which specifies that a search warrant may issue to search for "an individual * * * who is unlawfully held in confinement or other restraint." As noted in the Commentary thereto, id. at p. 507:

> Ordinarily such persons will be held against their will and in that case the persons are, of course, not subject to "seizure." But they are, in a sense, "evidence" of crime, and the use of search warrants for these purposes presents no conceptual difficulties.

Some state search warrant provisions also provide for issuance of a warrant in these circumstances. See, e.g., Ill.Rev.Stat. ch. 38, § 108-3 ("Any person who has been kidnapped in violation of the laws of this State, or who has been kidnapped in another jurisdiction and is now concealed within this State").

It may be that very often exigent circumstances, especially the need to act very promptly to protect the life or well-being of the kidnap victim, would justify an immediate warrantless search for the person restrained. But this is not inevitably the case. Moreover, as noted above, there should be available a process whereby law enforcement agents may acquire in advance a judicial determination that they have cause to intrude upon the privacy of those at the place where the victim is thought to be located.

That part of the amendment which authorizes issuance of a search warrant to search for a person to be arrested is also consistent with ALI Model Code of Pre-Arraignment Procedure § SS 210.3(1)(d) (Proposed Official Draft, 1975), which states that a search warrant may issue to search for "an individual for whose arrest there is reasonable cause." As noted in the Commentary thereto, id. at p. 507, it is desirable that there be "explicit statutory authority for such searches." Some state search warrant provisions also expressly provide for the issuance of a search warrant to search for a person to be arrested. See, e.g., Del. Code Ann. tit. 11, § 2305 ("Persons for whom a warrant of arrest has been issued"). This part of the amendment to Rule 41 covers a defendant or witness for whom an arrest warrant has theretofore issued, or a defendant for whom grounds to arrest exist even though no arrest warrant has theretofore issued.

In United States v. Watson, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976), the Court once again alluded to "the still unsettled question" of whether, absent exigent circumstances, officers acting without a warrant may enter private premises to make an arrest. Some courts have indicated that probable cause alone ordinarily is sufficient to support an arrest entry, United States v. Fernandez, 480 F.2d 726 (2d Cir. 1973); United States ex rel. Wright v. Woods, 432 F.2d 1143 (7th Cir. 1970). There exists some authority, however, that except under exigent circumstances a warrant is required to enter the defendant's own premises, United States v. Calhoun, 542 F.2d 1094 (9th Cir. 1976); United States v. Lindsay, 506 F.2d 166 (D.C.Cir. 1974); Dorman v. United States, 435 F.2d 385 (D.C.Cir. 1970), or, at least, to enter the premises of a third party, Virgin Islands v. Gereau, 502 F.2d 914 (3d Cir. 1974); Fisher v. Volz, 496 F.2d 333 (3d Cir. 1974); Huotari v. Vanderport, 380 F.Supp. 645 (D. Minn. 1974).

It is also unclear, assuming a need for a warrant, what kind of warrant is required, although it is sometimes assumed that an arrest warrant will suffice, e.g., United States v. Calhoun, supra; United States v. James, 528 F.2d 999 (5th Cir. 1976). There is a growing body of authority, however, that what is needed to justify entry of the premises of a third party to arrest is a search warrant, e.g., Virgin Islands v. Gereau, supra; Fisher v. Volz, supra. The theory is that if the privacy of this third party is to be protected adequately, what is needed is a probable cause determination by a magistrate that the wanted person is presently within that party's premises. "A warrant for the arrest of a suspect may indicate that the police officer has probable cause to believe the suspect committed the crime; it affords no basis to believe the suspect is in some stranger's home." Fisher v. Volz, supra.

It has sometimes been contended that a search warrant should be required for a nonexigent entry to arrest even when the premises to be entered are those of the person to be arrested. Rotenberg & Tanzer, Searching for the Person to be Seized, 35 Ohio St.L.J. 56, 69 (1974). Case authority in support is lacking, and it may be that the protections of a search warrant are less important in such a situation because ordinarily "rudimentary police procedure dictates that a suspect's residence be eliminated as a possible hiding place before a search is conducted elsewhere." People v. Sprovieri, 95 Ill.App.2d 10, 238 N.E.2d 115 (1968).

Despite these uncertainties, the fact remains that in some circuits under some circumstances a search warrant is required to enter private premises to arrest. Moreover, the law on this subject is in a sufficient state of uncertainty that this position may be taken by other courts. It is thus important that Rule 41 clearly express that a search warrant for this purpose may issue. And even if future decisions head the other direction, the need for the amendment would still exist. It is clear that law enforcement officers "may not constitutionally enter the home of a private individual to search for another person, though he be named in a valid arrest warrant in their possession, absent probable cause to believe that the named suspect is present within at the time." Fisher v. Volz, supra. The cautious officer is entitled to a procedure whereby he may have this probable cause determination made by a neutral and detached magistrate in advance of the entry.

Rule 43. Presence of the Defendant.

* * *

(b) ~~CONTINUED PRESENCE NOT REQUIRED.~~ FORFEITURE OF RIGHT TO BE PRESENT. The ~~further~~ progress of a trial to and including the return of a verdict shall not be prevented by defendant's absence and the defendant shall be considered to have

~~waived~~ forfeited his right to be present whenever a defendant~~, initially present,~~

(1) ~~voluntarily~~ absents himself ~~after~~ from the trial ~~has commenced (whether or not he has been informed by the court of his obligation to remain during trial)~~, unless it is thereafter shown that his absence was for good cause, or

(2) after being warned by the court that disruptive conduct will cause him to be removed from the courtroom, persists in conduct which is such as to justify his being excluded from the courtroom.

* * *

ADVISORY COMMITTEE NOTE

Subdivision (b) is amended so as to deal with the situations included therein in terms of forfeiture rather than waiver. Although waiver terminology is commonly found in the cases, a defendant who absents himself or who engages in disruptive conduct does not really "agree" to be tried in his absence or "intentionally relinquish" his right to be present. Rather he loses or forfeits his right to be present by way of a penalty for violating certain obligations or conditions. See *People* v. *Evans*, 21 Ill.2d 403, 172 N.E.2d 799 (1961). This is more than a matter of semantics. In Illinois v. Allen, 397 U.S. 337 (1970), holding that a disruptive defendant may be excluded from his trial, the Court did not conclude that the defendant had waived his right to be present, but rather than he "lost his right" by virtue of his behavior "of such an extreme and aggravated nature as to justify either his removal from the courtroom or his total physical restraint." The court of appeals had reached the opposite result by analyzing the case in terms of waiver and concluding that so long as Allen insisted upon his right to be present, which he clearly did, he could not be held to have waived it because "the insistence of a defendant that he exercise this right under unreasonable conditions does not amount to a waiver." 413 F.2d 232 (7th Cir. 1969).

The amendment to subdivision (b)(1) makes it clear that a defendant not present either at the start of a trial or at later stages of a trial is deemed to have forfeited his right to be present and may lawfully be tried in absentia, unless it is thereafter shown that his absence was for good cause. Although precisely what constitutes good cause must be determined on a case-by-case basis, it may generally be said that good cause is lacking if the defendant (i) was aware that the trial was scheduled to begin or continue at a certain time and place and (ii) had no good reason for failing to be present at such commencement or continuation of the trial. See United States v. Peterson, 524 F.2d 167 (4th Cir. 1975) (right to be present lost "by absconding without a compelling reason, after having received actual notice of the time and place of trial"); Government of Virgin Islands v. Brown, 507 F.2d 186 (3d Cir. 1975) (notes that defendant had been notified "of the date and precise time his trial was to commence" and that when he finally appeard "he offered no explanation for his absence"); United States v. Tortora, 464 F.2d 1202 (2d Cir. 1972) (right to be present lost where defendant "knows that the trial of the charges is to begin on a day certain" and "he deliberately absents himself without some sound reason for remaining away"); Cureton v. United States, 396 F.2d 671 (D.C.Cir. 1968) (referred to in Taylor v. United States, 414 U.S. 17 (1973), as stating the "controlling rule"; says defendant "must be aware of the processes taking place" and "must have no sound reason for remaining away").

If the court decides to proceed with a trial notwithstanding the absence of a defendant, it will not ordinarily be possible to determine conclusively at that time that a forfeiture has occurred. As the cases indicate, the practice is to proceed when it appears that there has been a forfeiture, leaving open the possibility that when the defendant ultimately is apprehended or otherwise appears he may show cause for his absence. As stated in Cureton:

> The defendant must be present at his sentencing. An opportunity could then be afforded the defendant to make any explanation he may have for his absence and also for development on the record of a basis upon which to determine whether * * * the court properly continued with the trial in the defendant's absence.

See also Taylor v. United States, supra (noting that "when petitioner was questioned at sentencing regarding his flight, * * * no issue of the voluntariness of his disappearance was ever raised"); United States v. Peterson, supra (noting that defendant "offered no explanation for his absence at trial * * * at the time of sentencing"); Government of Virgin Islands v. Brown, supra (noting that when defendant appeared later "he offered no explanation for his absence"); United States v. Tortora, supra (noting that "[n]o justification * * * has been offered for his absence"). Consistent with these decisions, the rule indicates that the forfeiture issue can only be finally resolved on a later occasion and also stresses that the burden is on the defendant to come forward with an explanation for his absence.

The rule does not require that the defendant have been specifically advised that his absence could result in a trial in absentia. In Taylor v. United States, supra, the Supreme Court rejected the defendant's contention that "his mere voluntary absence from the trial cannot be construed as an effective waiver * * * unless it is demonstrated that he knew or had been expressly warned by the trial court not only that he had a right to be present but also that the trial would continue in his absence and thereby effectively foreclose his right to testify and to confront personally the witnesses against him."

As noted, however, it is necessary that the defendant have been aware of the time the trial was to commence or continue. The cases indicate that there are various ways to ensure that a defendant has this information. See Taylor v. United States, supra (defendant "had been present at the expiration of the morning session when the court announced that the lunch recess would last until 2:00 p.m., and he had been told by his attorney to return to the courtroom at that time"); United States v. Peterson, supra (defendant "had been informed that the trial was scheduled for May 1, 1973, and his bond, expressly noting the dates and times of his pretrial hearing and trial, was conditioned on his appearances thereat"); Government of Virgin Islands v. Brown, supra (defendant "was served with a subpoena ordering him to appear in court on April 30, 1974, at 9:00 A.M., at which time his trial was to commence"); United States v. Tortora, supra (defendant "was present in open court when Judge Pollack continued the case until August 16" and "on the evening of August 15 * * * called his attorney to arrange for a ride to court the following morning"). See also

Cureton v. United States, supra (recommending that upon recess of trial "the defendant on the record should be given directions as to his appearance"; case remanded for further inquiry where record showed "no remarks were addressed directly to appellant; and his counsel seemed uncertain of his advise to appellant about appearing on Monday").

Although subdivision (b)(1) identifies the circumstances in which the defendant may be said to have forfeited his right to be present by not appearing at the designated time and place, it does not follow that in every instance in which such a forfeiture has occurred it would be appropriate to proceed with the trial in defendant's absence. As noted in United States v. Tortora, supra:

> It is obviously desirable that a defendant be present at his own trial. We do not here lay down a general rule that, in every case in which the defendant is voluntarily absent at the empanelment of the jury and the taking of evidence, the trial judge should proceed with the trial. We only hold that this is within the discretion of the trial judge, to be utilized only in circumstances as extraordinary as those before us. Indeed, we would add that this discretion should be exercised only when the public interest clearly outweighs that of the voluntarily absent defendant. Whether the trial will proceed will depend upon the trial judge's determination of a complex of issues. He must weigh the likelihood that the trial could soon take place with the defendant present; the difficulty of rescheduling, particularly in multiple-defendant trials; the burden on the Government in having to undertake two trials, again particularly in multiple-defendant trials where the evidence against the defendants is often overlapping and more than one trial might keep the Government's witnesses in substantial jeopardy.

Rule 44. Right to and Assignment of Counsel

* * *

(c) JOINT REPRESENTATION. Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

ADVISORY COMMITTEE NOTE

Rule 44(c) establishes a procedure for avoiding the occurrence of events which might otherwise give rise to a plausible post-conviction claim that because of joint representation the defendants in a criminal case were deprived of their Sixth Amendment right to the effective assistance of counsel. Although "[t]he Circuits are divided on whether the trial judge has a duty to inquire into conflicts or whether that responsibility may properly be left with defense counsel," United States v. Lawriw, --- F.2d --- (8th Cir. 1977) (collecting the authorities), this amendment is generally consistent with the current state of the law in several circuits. As held in United States v. Carrigan, 543 F.2d 1053 (2d Cir. 1976):

> When a potential conflict of interest arises, either where a court has assigned the same counsel to represent several defendants or where the same counsel has been retained by co-defendants in a criminal case, the proper course of action for the trial judge is to conduct a hearing to determine whether a conflict exists to the degree that a defendant may be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the Sixth Amendment. The defendant should be fully advised by the trial court of the facts underlying the potential conflict and be given the opportunity to express his views.

See also United States v. Lawriw, supra (duty on trial judge to make inquiry where joint representation by appointed or retained counsel, and "without such an inquiry a finding of knowing and intelligent waiver will seldom, if ever, be sustained by this Court");

Abraham v. *United States*, 549 F.2d 236 (2d Cir. 1977); *United States* v. *Mari*, 526 F.2d 117 (2d Cir. 1975); *United States* v. *Truglio*, 493 F.2d 574 (4th Cir. 1974) (joint representation should cause trial judge "to inquire whether the defenses to be presented in any way conflict"); *United States* v. *DeBerry*, 487 F.2d 488 (2d Cir. 1973); *United States ex rel. Hart* v. *Davenport*, 478 F.2d 203 (3d Cir. 1973) (noting there "is much to be said for the rule . . . which assumes prejudice and nonwaiver if there has been no on-the-record inquiry by the court as to the hazards to defendants from joint representation"); *United States* v. *Alberti*, 470 F.2d 878 (2d Cir. 1973); *United States* v. *Foster*, 469 F.2d 1 (1st Cir. 1972) (lack of sufficient inquiry shifts the burden of proof on the question of prejudice to the government); *Campbell* v. *United States*, 352 F.2d 359 (D.C.Cir. 1965) (where joint representation, court "has a duty to ascertain whether each defendant has an awareness of the potential risks of that course and nevertheless has knowingly chosen it"). Some states have taken a like position; see, e.g., *State* v. *Olsen*, --- Minn. ---, 258 N.W.2d 898 (1977).

This procedure is also consistent with that recommended in the ABA Standards Relating to the Function of the Trial Judge (Approved Draft, 1972), which provide in § 3.4(b):

> Whenever two or more defendants who have been jointly charged, or whose cases have been consolidated, are represented by the same attorney, the trial judge should inquire into potential conflicts which may jeopardize the right of each defendant to the fidelity of his counsel.

Avoiding a conflict-of-interest situation is in the first instance a responsibility of the attorney. If a lawyer represents "multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment," and he is to "resolve all doubts against the propriety of the representation." Code of Professional Responsibility, Ethical Consideration 5-15. See also ABA Standards Relating to the Defense Function § 3.5(b) (Approved Draft, 1971), concluding that the "potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation."

It by no means follows that the inquiry provided for by rule 44(c) is unnecessary. For one thing, even the most diligent attorney may be unaware of facts giving rise to a potential conflict. Often "counsel must operate somewhat in the dark and feel their way uncertainly to an understanding of what their clients may be called upon to meet upon a trial" and consequently "are frequently unable to foresee developments which may require changes in strategy." United States v. Carrigan, supra (concurring opinion). "Because the conflicts are often subtle it is not enough to rely upon counsel, who may not be totally disinterested, to make sure that each of his joint clients has made an effective waiver." United States v. Lawriw, supra.

Moreover, it is important that the trial judge ascertain whether the effective and fair administration of justice would be adversely affected by continued joint representation, even when an actual conflict is not then apparent. As noted in United States v. Mari, supra (concurring opinion):

> Trial court insistence that, except in extraordinary circumstances, codefendants retain separate counsel will in the long

> run . . . prove salutary not only to the administration of justice and the appearance of justice but the cost of justice; habeas corpus petitions, petitions for new trials, appeals and occasionally retrials . . . can be avoided. Issues as to whether there is an actual conflict of interest, whether the conflict has resulted in prejudice, whether there has been a waiver, whether the waiver is intelligent and knowledgeable, for example, can all be avoided. Where a conflict that first did not appear subsequently arises in or before trial, . . . continuances or mistrials can be saved. Essentially by the time a case . . . gets to the appellate level the harm to the appearance of justice has already been done, whether or not reversal occurs; at the trial level it is a matter which is so easy to avoid.

A rule 44(c) inquiry is required whether counsel is assigned or retained. It "makes no difference whether counsel is appointed by the court or selected by the defendants; even where selected by the defendants the same dangers of potential conflict exist, and it is also possible that the rights of the public to the proper administration of justice may be affected adversely." United States v. Mari, supra (concurring opinion). See also United States v. Lawriw, supra. When there has been "no discussion as to possible conflict initiated by the court," it cannot be assumed that the choice of counsel by the defendants "was intelligently made with knowledge of any possible conflict." United States v. Carrigan, supra. As for assigned counsel, it is provided by statute that "the court shall appoint separate counsel for defendants having interests that cannot properly be represented by the same counsel, or when other good cause is shown." 18 U.S.C. § 3006(A)(b). Rule 44(c) is not intended to prohibit the automatic appointment of separate counsel in the first instance, see Ford v. United States, 379 F.2d 123 (D.C.Cir. 1967); Lollar v. United States, 376 F.2d 243 (D.C.Cir. 1967), which would obviate the necessity for an inquiry.

Under rule 44(c), an inquiry is called for when the joined defendants are represented by the same attorney and also when they are represented by attorneys "associated in the practice of law." This is consistent with Code of Professional Responsibility, Disciplinary Rule 5-105(D) (providing that if "a lawyer is required to decline employment or to withdraw from employment" because of a potential conflict, "no partner or associate of his or his firm may accept or continue such employment"); and ABA Standards Relating to the Defense Function § 3.5(b) (Approved Draft, 1971) (applicable to "a lawyer or lawyers who are associated in practice").

The rule 44(c) procedure is not limited to cases expected to go to trial. Although the more dramatic conflict situations, such as when the question arises as to whether the several defendants should take the stand, Morgan v. United States, 396 F.2d 110 (2d Cir. 1968), tend to occur in a trial context, serious conflicts may also arise when one or more of the jointly represented defendants pleads guilty.

> The problem is that even where as here both codefendants pleaded guilty there are frequently potential conflicts of interest . . . [T]he prosecutor may be inclined to accept a guilty plea from one codefendant which may harm the interests of the other. The contrast in the dispositions of the cases may have a harmful impact on the codefendant who does not initially plead guilty; he may be pressured into pleading guilty himself rather than face his codefendant's bargained-for testimony at a trial. And it will be his own counsel's recommendation to the initially

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> pleading codefendant which will have contributed to this harmful impact upon him . . . [I]n a given instance it would be at least conceivable that the prosecutor would be willing to accept pleas to lesser offenses from two defendants in preference to a plea of guilty by one defendant to a greater offense.

United States v. Mari, supra (concurring opinion). To the same effect is ABA Standards Relating to the Defense Function at 213-14.

It is contemplated that under rule 44(c) the court will make appropriate inquiry of the defendants and of counsel regarding the possibility of a conflict of interest developing. Whenever it is necessary to make a more particularized inquiry into the nature of the contemplated defense, the court should "pursue the inquiry with defendants and their counsel on the record but in chambers" so as "to avoid the possibility of prejudicial disclosures to the prosecution." United States v. Foster, supra. It is important that each defendant be "fully advised of the facts underlying the potential conflict and is given an opportunity to express his or her views." United States v. Alberti, supra. The rule specifically requires that the court personally advise each defendant of his right to effective assistance of counsel, including separate representation. See United States v. Foster, supra, requiring that the court make a determination that jointly represented defendants "understand that they may retain separate counsel, or if qualified, may have such counsel appointed by the court and paid for by the government."

Under rule 44(c), the court is to take appropriate measures to protect each defendant's right to counsel unless it appears "there is good cause to believe no conflict of interest is likely to arise" as a consequence of the continuation of such joint representation. A less demanding standard would not adequately protect the Sixth Amendment right to effective assistance of counsel or the effective administration of criminal justice. It would not suffice, for example, to require the court to act only when a conflict of interest is then apparent, for it is not possible to "anticipate with complete accuracy the course that a criminal trial may take." Fryar v. United States, 404 F.2d 1071 (10th Cir. 1968). This is particularly so in light of the fact that if a conflict later arises and a defendant thereafter raises a Sixth Amendment objection, a court must grant relief without indulging "in nice calculations as to the amount of prejudice arising from its denial." Glasser v. United States, 315 U.S. 60 (1942).

Rule 44(c) does not specify what particular measures must be taken. It is appropriate to leave this within the court's discretion, for the measures which will best protect each defendant's right to counsel may well vary from case to case. One possible course of action is for the court to obtain a knowing, intelligent and voluntary waiver of the right to separate representation. See United States v. DeBerry, supra, holding that defendants should be jointly represented only if "the court has ascertained that . . . each understands clearly the possibilities of a conflict of interest and waives any rights in connection with it." It must be emphasized that a "waiver of the right to separate represenation should not be accepted by the court unless the defendants have each been informed of the probable hazards; and the voluntary character of their waiver is apparent." ABA Standards Relating to the Function of the Trial Judge at 45. United States v. Garcia, supra, spells out in significant detail what should be done to assure an adequate waiver:

> As in Rule 11 procedures, the district court should address each defendant personally and forthrightly advise him of the potential dangers of representation by counsel with a conflict of interest. The defendant must be at liberty to

> question the district court as to the nature and consequences of his legal representation. Most significantly, the court should seek to elicit a narrative response from each defendant that he has been advised of his right to effective representation, that he understands the details of his attorney's possible conflict of interest and the potential perils of such a conflict, that he has discussed the matter with his attorney or if he wishes with outside counsel, and that he voluntarily waives his Sixth Amendment protections. It is, of course, vital that the waiver be established by "clear, unequivocal, and unambiguous language." . . . Mere assent in response to a series of questions from the bench may in some circumstances constitute an adequate waiver, but the court should nonetheless endeavor to have each defendant personally articulate in detail his intent to forego this significant constitutional protection. Recordation of the waiver colloque between defendant and judge will also serve the government's interest by assisting in shielding any potential conviction from collateral attack, either on Sixth Amendment grounds or on a Fifth or Fourteenth Amendment "fundamental fairness" basis.

See also Hyman, Joint Representation of Multiple Defendants in a Criminal Trial: The Court's Headache, 5 Hofstra L.Rev. 315, 334 (1977).

Another possibility is that the court will order that the defendants be separately represented in subsequent proceedings in the case. The court need not permit the joint representation to continue merely because the defendants express a willingness to so proceed. That is,

> there will be cases where the court should require separate counsel to represent certain defendants despite the expressed wishes of such defendants. Indeed, failure of the trial court to require separate representation may . . . require a new trial, even though the defendants have expressed a desire to continue with the same counsel. The right to effective representation by counsel whose loyalty is undivided is so paramount in the proper administration of criminal justice that it must in some cases take precedence over all other considerations, including the expressed preference of the defendants concerned and their attorney.

United States v. Carrigan, supra (concurring opinion). See also United States v. Lawriw, supra; Abraham v. United States, supra; ABA Standards Relating to the Defense Function at 213, concluding that in some circumstances "even full disclosure and consent of the client may not be a adequate protection." As noted in United States v. Dolan, --- F.2d --- (3d Cir. 1978), such an order may be necessary where the trial judge is

> not satisfied that the waiver is proper. For example, a defendant may be competent enough to stand trial, but not competent enough to understand the complex, subtle, and sometimes unforeseeable dangers inherent in multiple representation. More importantly, the judge may find that the waiver cannot be intelligently made simply because he is not in a position to inform the defendant of the foreseeable prejudices multiple representation might entail for him.

As concluded in Dolan, "exercise of the court's supervisory powers by disqualifying an attorney representing multiple criminal defendants in spite of the defendants' express desire to retain that attorney does not necessarily abrogate defendant's sixth amendment rights". It does not follow from the absolute right of self-representation recognized in Faretta v. California, 422 U.S. 806 (1975), that there is an absolute right to counsel of one's own choice. Thus,

> when a trial court finds an actual conflict of interest which impairs the ability of a criminal defendant's chosen counsel to conform with the ABA Code of Professional Responsibility, the court should not be required to tolerate an inadequate representation of a defendant. Such representation not only constitutes a breach of professional ethics and invites disrespect for the integrity of the court, but it is also detrimental to the independent interest of the trial judge to be free from future attacks over the adequacy of the waiver or the fairness of the proceedings in his own court and the subtle problems implicating the defendant's comprehension of the waiver. Under such circumstances, the court can elect to exercise its supervisory authority over members of the bar to enforce the ethical standard requiring an attorney to decline multiple representation.

United States v. Dolan, supra. See also Geer, Conflict of Interest and Multiple Defendants in a Criminal Case: Professional Responsibilities of the Defense Attorney, 62 Minn.L.Rev. --- (1977); Note, Conflict of Interests in Multiple Representation of Criminal Co-Defendants, 68 J.Crim.L. & C. 226 (1977).

The failure in a particular case to conduct a rule 44(c) inquiry would not, standing alone, necessitate the reversal of a conviction of a jointly represented defendant. However, as is currently the case, a reviewing court is more likely to assume a conflict resulted from the joint representation when no inquiry or an inadequate inquiry was conducted. United States v. Carrigan, supra; United States v.

DeBerry, supra. On the other hand, the mere fact that a rule 44(c) inquiry was conducted in the early stages of the case does not relieve the court of all responsibility in this regard thereafter. The obligation placed upon the court by rule 44(c) is a continuing one, and thus in a particular case further inquiry may be necessary on a later occasion because of new developments suggesting a potential conflict of interest.

PRELIMINARY DRAFT OF PROPOSED AMENDMENT TO RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS

Rule 10. Powers of Magistrates

The duties imposed upon the judge of the district court by these rules ~~2, 3, 4, 6, and 7~~ may be performed by a United States magistrate pursuant to 28 U.S.C. § 636. ~~if and to the extent that he is so empowered by rule of the district court, and to the extent the district court has established standards and criteria for the performance of such duties, except that when such duties involve the making of an order, under rule 4, dismissing the petition, the magistrate shall submit to the court his report as to the facts and his recommendation with respect to the order to be made by the court,~~

ADVISORY COMMITTEE NOTE

This amendment conforms the rule to subsequently enacted legislation clarifying and further defining the duties which may be assigned to a magistrate, 18 U.S.C. § 636, as amended in 1976 by Pub.L. 94-577. To the extent that rule 10 is more restrictive than § 636, the limitations are of no effect, for the statute expressly governs "[n]otwithstanding any provision of law to the contrary."

The reference to particular rules is stricken, as under § 636(b)(1)(A) a judge may designate a magistrate to perform duties under other rules as well (e.g., order that further transcripts be furnished under rule 5; appoint counsel under rule 8). The reference to "established standards and criteria" is stricken, as § 636(4) requires each district court to "establish rules pursuant to which the magistrates shall discharge their duties." The exception with respect to a rule 4 order dismissing a petition is stricken, as that limitation appears in § 636(b)(1)(B) and is thereby applicable to certain other actions under these rules as well (e.g., determination of a need for an evidentiary hearing under rule 8; dismissal of a delayed or successive petition under rule 9).

PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS

Rule 10. Powers of Magistrates

The duties imposed upon the judge of the district court by these rules ~~2, 3, 4, 6, and 7~~ may be performed by a United States magistrate pursuant to 28 U.S.C. § 636. ~~if and to the extent that he is so empowered by rule of the district court, and to the extent the district court has established standards and criteria for the performance of such duties, except that, when such duties involve the making of an order under rule 4 dismissing the motion, the magistrate shall submit to the court his report as to the facts and his recommendation with respect to the order to be made by the court.~~

ADVISORY COMMITTEE NOTE

This amendment conforms the rule to 18 U.S.C. § 636. See Advisory Committee Note to rule 10 of the Rules Governing Section 2254 Cases in the United States District Courts.

Rule 11. Time for Appeal

The time for appeal from an order entered on a motion for relief made pursuant to these rules is as provided in Rule 4(a) of the Federal Rules of Appellate Procedure. Nothing in these rules shall be construed as extending the time to appeal from the original judgment of conviction in the district court.

ADVISORY COMMITTEE NOTE

Prior to the promulgation of the Rules Governing Section 2255 Proceedings, the courts consistently held that the time for appeal in a section 2255 case is as provided in Fed.R.App.P. 4(a), that is, 60 days when the government is a party, rather than as provided in appellate rule 4(b), which says that the time is 10 days in criminal cases. This result has often been explained on the ground that rule 4(a) has to do with civil cases and that "proceedings under section 2255 are civil in nature." E.g., *Rothman* v. *United States*, 508 F.2d 648 (3d Cir. 1975). Because the new section 2255 rules are based upon the premise "that a motion under § 2255 is a further step in the movant's criminal case rather than a separate civil action," see Advisory Committee Note to rule 1, the question has arisen whether the new rules have the effect of shortening the time for appeal to that provided in appellate rule 4(b). A sentence has been added to rule 11 in order to make it clear that this is not the case.

Even though section 2255 proceedings are a further step in the criminal case, the added sentence correctly states current law. In United States v. Hayman, 342 U.S. 205 (1952), the Supreme Court noted that such appeals "are governed by the civil rules applicable to appeals from final judgments in habeas corpus actions." In support, the Court cited Mercado v. United States, 183 F.2d 486 (1st Cir. 1950), a case rejecting the argument that because § 2255 proceedings are criminal in nature the time for appeal is only 10 days. The Mercado court concluded that the situation was governed by that part of 28 U.S.C. § 2255 which reads: "An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus." Thus, because appellate rule 4(a) is applicable in habeas cases, it likewise governs in § 2255 cases even though they are criminal in nature.

PRELIMINARY DRAFT OF PROPOSED AMENDMENT
TO THE FEDERAL RULES OF EVIDENCE

Rule 410. Inadmissibility of Pleas, ~~Offers of Pleas~~ Plea Discussions, and Related Statements

Except as otherwise provided in this rule, evidence of the following ~~a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers,~~ is not admissible ~~in any civil or criminal proceeding~~ against the person who made the plea or ~~offer~~ was a party to the discussions, in any civil or criminal proceeding:

(1) a plea of guilty which was later withdrawn;

(2) a plea of nolo contendere;

(3) plea discussions with the attorney for the government, concerning the crime charged or any other crime, which

do not result in a plea of guilty or which result in a plea of guilty later withdrawn; or

(4) statements made in the course of or as a consequence of such pleas or plea discussions.

However, ~~evidence of~~ such a statement ~~made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime,~~ is admissible in any proceeding wherein statements made in the course of or as a consequence of the same plea or plea discussions have been introduced, or in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

ADVISORY COMMITTEE NOTE

Present rule 410 conforms to rule 11(e)(6) of the Federal Rules of Criminal Procedure. A proposed amendment to rule 11(e)(6) would clarify the circumstances in which pleas, plea discussions and related statements are inadmissible in evidence; see Advisory Committee Note thereto. The amendment proposed above would make comparable changes in rule 410.